No. 23. and 24.

Brief of Brown for P. C.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897.

Filed Sept. 27, 1897.

No. 23.

THE ST. ANTHONY FALLS WATER POWER COMPANY, PLAINTIFF IN ERROR,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL.

No. 24.

THE MINNEAPOLIS MILL COMPANY, PLAINTIFF IN ERROR,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

ROME G. BROWN, and

Charles S. Albert, *Attorneys for Plaintiffs in Error.*

Nos. 23 and 24.

IN THE

Supreme Court, State of Minnesota,

OCTOBER TERM, A. D. 1893.

Nos. 8394 and 8395.

THE MINNEAPOLIS MILL CO., PLAINTIFF, APPELLANT,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, DEFENDANT, RESPONDENT.

THE ST. ANTHONY FALLS WATER POWER COMPANY, PLAINTIFF, APPELLANT,

vs.

THE BOARD OF WATER COMMISSIONERS OF T... CITY OF ST. PAUL, DEFENDANT, RESPONDENT.

[TWO CASES.]

Assignments of Error and Points and Authorities of Appellants.

BENTON, ROBERTS & BROWN,
Attorneys for Appellants.

Filed November 10, 1893.

C. P. HOLCOMB, *Clerk.*

This brief contains on pages 38 and 39 the following:

* * * * * * *

Before closing we raise the objection that the taking of waters in the manner shown in this case without allowing any sort of compensation to appellants (1) is a taking of private property without due process of law; (2) is a taking of private property for public uses without compensation; (3) impairs the obligation of contracts, and is in contravention, not only of our State constitution, but of the Constitution of the United States.

* * * * * * *

STATE OF MINNESOTA:

SUPREME COURT.

OFFICE OF CLERK OF SUPREME COURT.

I, D. F. Reese, clerk of the supreme court of the State of Minnesota, do hereby certify and return to the Supreme Court of the United States that in the case of The St. Anthony Falls Water Power Company, plaintiff and appellant, against The Board of Water Commissioners of the City of St. Paul, defendant, respondent, and in the case of The Minneapolis Mill Company, plaintiff, appellant, against same defendant, respondent, which cases are numbered eighty-three hundred ninety-four and eighty-three hundred ninety-five, respectively, in the files of this court, decision in which was filed February 9, 1894, that before said cases were argued and on November 10, 1893, the appellants in both said cases filed in this court printed briefs, which were submitted to said supreme court on the argument of said cases, and that ever since the time of said filing, said brief, with the file-marks thereon, has been and still is on file in this

office as part of the files, records, and proceedings of this court in said cases, and that the brief hereto attached is a true and correct copy of the said original brief so filed and so still on file, and the file-marks endorsed on the copy so attached hereto are true and exact copies of the original file-marks and endorsements so on said original; and I do make this as a further return to the writs of error in said cases issued by the Supreme Court of the United States.

In witness whereof I have hereunto set my hand and the seal of the supreme court of the State of Minnesota, at St. Paul, Minnesota, this 15th day of October, A. D. 1897.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE,
Clerk of Supreme Court, State of Minnesota,
By J. L. HELM, *Deputy.*

[Endorsed:] Cases Nos. 15,683 and 15,684. Supreme Court U. S., October term, 1897. Term Nos., 23 and 24. The St. Anthony Falls Water Power Company, pl'ff in error, *vs.* The Board of Water Commissioners of the City of St. Paul, and The Minneapolis Mill Co., pl'ff in error, *vs.* The Board of Water Commissioners of the City of St. Paul. Certified copy of brief of pl'ff in error in supreme court of Minnesota.

[Stamped:] Office Supreme Court U. S. Filed Oct. 18, 1897. James H. McKenney, clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897.

No. 15,683.

THE ST. ANTHONY FALLS WATER POWER COMPANY, PLAINTIFF IN ERROR,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL.

No. 15,684.

THE MINNEAPOLIS MILL COMPANY, PLAINTIFF IN ERROR,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF AND ARGUMENT
FOR PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

These two cases are in this Court upon writs of error issued to the Supreme Court of the State of Minnesota to correct errors of the State Court in rendering final judgments of dismissal in the actions, which were brought in the District Court of the State and appealed to the State Supreme Court, which is the highest court in that state in which judgment in the actions could be rendered.

The general grounds upon which jurisdiction is claimed upon these writs of error for this court are: (1) That the judgment and decision of the State court is in favor of the validity of the act of the Legislature of the State of Minnesota, approved March 4, 1885, being Chapter 110 of the Special Laws of Minnesota for 1885 (see "8" Appendix hereto attached), which said statute, as construed by the State court, deprives plaintiffs in error of private property without due process of law; (2) that the same statute, as construed by the State court, impairs the obligation of the contract right belonging to plaintiffs in error and conferred upon them respectively by their charters, passed by the Territorial Legislature of Minnesota in 1856 (see charters of plaintiffs in error, "6" and "7" Appendix).

The pleadings and record show that both these federal questions were necessarily involved in the decision of the State court; and further that they were both passed upon adversely to the plaintiffs in error. The pleadings further show that the only questions decided, either by the lower court or the

Supreme Court, in rendering the final judgment against the plaintiffs in error, were questions directly involving these two federal questions.

While each of these cases was a separate case in the State courts, and each was brought here upon a separate writ of error, the dissimilarity in the issues of law and fact is so little, that they were considered together in the State courts; and they are to be considered and argued together in this court.

STATEMENT OF FACTS.

There is no issue of fact for this court to pass upon. Issues of facts were made by the pleadings; but the judgment of dismissal is upon the facts shown by the plaintiffs themselves. There can be no material dispute between the parties in the statement of the facts as they are disclosed by the record. A statement, however, of the issues made by the pleadings and the facts as disclosed by the record, together with the decision of the State court, is necessary to show in what way the questions of law arise.

The Pleadings.

The complaint in each case alleges that the plaintiff was incorporated by the act of the Territorial Legislature, specifically referred to, and that the defendant was incorporated by the act of the State Legislature, specifically referred to; and alleges that in pursuance of the charter of plaintiff, it did acquire riparian lands upon the Missisippi River in the City of Minneapolis at the Falls of St. Anthony, setting out the ex-

tent of these lands; and that upon and opposite to its lands there is and always has been a natural fall in the river, making a natural water power; and that it did build extensive improvements in and upon its said lands and in the bed of said river, and did develop the said water power and make it available for use; and that it has made contracts with parties for the construction of mills and for the furnishing to them of the said water power, and that the power is a very valuable one; that all of said improvements and its ownership of said power and its said use of the same, were done and made in pursuance (1) of its rights acquired under said charter, (2) of its rights as riparian owner upon said river.

That the defendant has established a pumping station at the outlet of a great water-shed, which naturally drains into the Mississippi River above plaintiffs' power, and has pumped therefrom and threatens to pump therefom ten million gallons of water a day, and threatens not only to continue to pump the same amount per day but to increase its pumping to the amount of thirty million gallons a day; that the water so pumped by defendant is diverted from above the water power of plaintiffs and carried around and past said water power and that no part of it is returned to said Mississippi River above the water power of plaintiffs but ten miles below; that the said diversion takes away from the plaintiffs' said water power a large quantity of water power, which plaintiffs need and would otherwise use; and that the actual damages already incurred by plaintiff are Three Thousand Dollars; that defendant purports to act under its said charter, and has made no compensation, nor brought any proceedings to fix compensation to plaintiffs.

And plaintiff asks for Three Thousand Dollars damages already caused by said diversion and asks for a perpetual injunction against any diversion.

More formal parts of the pleadings are not repeated here.

The answer of defendant in each case is substantially a denial of the allegations as to damages, etc.; alleges that by its charter it has a right to divert the water without making compensation; and (as provided by its charter, No. "8" Appendix) asks that if the plaintiff be adjudged entitled to an injunction or damages that the action be turned into a condemnation proceeding and that the amount of plaintiffs' permanent damages be determined, etc.

Before the trial, defendant withdrew this last part of its answer (see page 16 Transcript); so that the case was tried solely upon the question whether the defendant's charter gave it a right, without compensation, to make the diversion complained of as against the rights of plaintiffs (1) as riparian owner (2) under their charters.

The Facts Shown by Plaintiffs' Evidence, as Appears from the Record.

(Transcript, pages 16-51.)

The material facts all appear without any contradiction. The statement which follows is substantially the same as made in the State Supreme Court, which was assumed by both parties and by that Court to be a correct statement of the facts: (The citation of pages refer to the Transcript of Record in this Court.)

1. The Situation of Plaintiffs in Error:—The Falls of St. Anthony are situated in the Mississippi River in the City of Minneapolis. There is a natural fall in the river of over seventy feet in a distance of about one thousand feet (page 26). Just above the Falls is Nicollet Island, by which the river is divided into two channels. In the East channel the natural flow is one-third of the waters in the river, and in the West channel two-thirds (page 27). By reason of the rapids the river is not naturally navigable, either at these Falls or for one-half mile below and for some distance above (page 26). Its present navigability, either for the sluicing of logs, or for small craft, exists only by reason of the artificial facilities incidentally furnished by means of the dams of the plaintiffs (page 28).

The plaintiff in error, the St. Anthony Falls Water Power Company (hereinafter called the Power Company) and the

plaintiff in error, the Minneapolis Mill Company, (hereinafter called the Mill Company) are the owners of all the lands bordering on the river at these Falls, including all the shore lands and all the Islands in the river, the Power Company on the East side and the Mill Company on the West side. Both are corporations created under the charters of 1856, ("6" and "7" in Appendix to this brief). The Power Company owns in fee all of the lands on the East side of the river shown in Exhibit "H," including Hennepin Island and Spirit Island, which is marked in yellow upon Exhibit "H"; and also owns flowage rights above that point to the extent needed for its dams.

The Mill Company owns the lands upon the West side of the river, at the same point, shown on Exhibit "H" by yellow coloring, including Upton's Island; and also flowage rights above its riparian lands sufficient for its dam (pages 34–36). The plaintiffs on the respective sides of the river on which they are situated, have built dams and structures to utilize the water power at this point. These dams are constructed upon lands respectfully owned by them, and extend out into the river and meet near the center of the West channel. (See Exhibit "H" and pages 35–36).

By these dams the waters of the river are collected and made useful for water power, and fifty feet fall is now utilized (page 37). Without these dams the waters of the river could not be utilized to any great extent, as there would otherwise have been a rapid fall (page 27, also page 37). Plaintiffs have been in possession of this property and in the use of its dams so built and constructed for over thirty-five years, that is, since 1856 (page 26, also page 48).

The dams and improvements are maintained and operated by the plaintiffs; and the water power developed and

rendered available is furnished, at certain prices, by them to large mills situated near and on the river, the income going to keep up the improvements and for profits (page 37.) The water is all taken in for use on plaintiffs' own lands and is returned to the river through their own lands (pages 36-37).

The charter of plaintiff Power Company, after the usual provisions for incorporation, gives to the Company special authority and privileges as follows:

SECTION 9. The said corporators are hereby authorized, for the purpose of the improvement of the water power above and below the Falls of St. Anthony, in the Mississippi River, to maintain the present dams and sluices, and construct and maintain dams, canals, and water sluices, erect mills, buildings, or other structures for the purpose of manufacturing in any of its branches, or improving any water power owned or possessed by said Company, in such manner, or to such extent as shall be authorized by the Directors of said Company, and may construct dams on the rapids above or below the Falls of St. Anthony, with side dams, sluices and all other improvements in the Mississippi River, upon the property owned or to be owned by said corporators, which may be necessary for the full enjoyment of the powers herein granted; provided however, that said corporation shall give a free passage for all loose logs that are to be manufactured on Hennepin or Cataract Islands, or between them on the Falls, through any dam or dams they may erect, on the west side of Nicollet or Hennepin Island, and a passage through the pond above said dam, shall when needed be twenty feet wide; provided that nothing herein contained shall be so construed as to authorize said corporation to interfere with the rights or property of any other person or persons whatever. (See No. "6" Appendix to this brief.)

The charter of the Mill Company, provides, after the usual provision for incorporation:

SECTION 9. The said corporators are hereby authorized, for the purpose of the improvement of the water power above and below the Falls of St. Anthony in the Mississippi River, to maintain the present dams and sluices, and to construct dams,

and canals and water sluices, erect mills, buildings, or other structures for the purpose of manufacturing in any of its branches, or improving any water power owned or possessed by said Company in such manner to such extent as shall be authorized by the Directors of said Company, and may construct dams on the rapids above or below the Falls of St. Anthony, with side dams, sluices, and all other improvements in the Mississippi River, which may be necessary for the full employment of the powers herein granted. * * *

SECTION 11. This act shall take effect and be in force from and after its passage, and may be amended by any subsequent Legislative Assembly, in any manner not destroying or impairing the vested rights of said corporators: provided, that nothing herein contained shall be so construed as to authorize said corporation to interfere with the rights or property of any other person or persons whatever.

SECTION 12. Provided further, that nothing contained in the act entitled an act to incorporate the St. Anthony Falls Water Power Company shall be so construed as to allow the said St. Anthony Falls Water Power Company, to maintain or construct dams or sluices extending beyond the center of the channel of the Mississippi River from the western bank of Hennepin Island, and said St. Anthony Falls Water Power Company are hereby restricted in the exercise of powers and privileges granted by the ninth section of said act to the space between the western bank of said Island and the center of said river; provided the said dams shall always be provided with suitable slides and sluices, so as to admit the passage of logs and timber down the Mississippi River, and that any future Legislature may amend, or modify this act or the act to which this section is amendatory, and provided further that the Minneapolis Mill Company shall be restricted in its operations to the center of the main channel of the Mississippi River and to the property belonging to said Company." (See No. "7" Appendix.)

2. Situation and Acts of Defendant. Defendant is a corporation under Chapter 110, of Special Laws of 1885, which act provides for the organization and incorporation of the defendant and provides: (See No. "8" Appendix.)

SECTION 6. That the said board of water commissioners may from time to time, for the purpose of furnishing a full

supply of water to the inhabitants of the City of St. Paul, extend said waterworks or make new lines of works, and as it shall from time to time so extend its said works or make new lines of works, it may draw water from any lake or creek by means of pipes,ditches, drains, conduits, aqueducts, or other means of conducting water so as to connect said lakes or creeks with its said works, and may erect and construct dams, bulk-heads, gates and other needed structures and means for controlling of water and its protection, and in general to do any other act necessary or convenient for accomplishing the purposes contemplated by this act.

SECTION 7. Whenever at any time said board shall propose to extend its said works so as to connect with any of said lakes or creeks, or to divert the waters of any stream, creek or body of water, it shall proceed as follows: (here follow provision for condemnation proceedings.)

SECTION 11. The owner or owners of any such land or lands, may maintain a suit for the recovery of the possession of lands used by the board of water commissioners, for the value thereof, and the damage thereto by reason of the taking thereof as aforesaid, either by flowage, drainage or otherwise, or damage of any kind.

SECTION 36. * * * The term "real estate" as used in this act, shall be construed to signify and embrace all uplands, lands under water, the waters of any lake, pond or stream, all and every estate, interest and right, legal and equitable, in lands or waters, including term for years, and liens thereon by way of judgment, mortgage or otherwise, and also all claims for damage to such real estate.

Purporting to act under this charter, the defendant in 1890, established a pumping station on Lake Baldwin, which is a fresh water lake with an area of about a mile square (page 28). This lake is situated in Anoka county, about eight miles above plaintiffs' water power (page 23). It is the outlet of an immense water shed of an area of one hundred and thirty square miles (page 25); in this water shed are several lakes with a water surface of twenty-five square miles (page 27; see Exhibit "G"). It is ten miles or more north

of St. Paul and in an entirely different water shed from that of St. Paul (page 24). This water shed, including Baldwin Lake, is drained by a natural stream, Rice Creek, which is the only outlet to that lake or that water shed (page 22), and which naturally flows out of Lake Baldwin and thence into the Mississippi river, above the water power of plaintiffs. Defendant owns a small tract of land on the shore of Lake Baldwin, upon which it has built a pumping plant with a capacity of ten million gallons a day or more. For three years it has been pumping water from Lake Baldwin out of the Rice Creek water shed into the St. Paul water shed, thereby diverting all of the waters pumped from its natural course past the water course of plaintiffs to a point fifteen miles below plaintiffs' water power (page 24, also Exhibit "G"). The pumping works established are permanent, and the pumping has extended down to and after the time when this suit was brought, and still continues (page 50). The water so pumped is carried to the City of St. Paul, not only for domestic uses of its inhabitants, but for sprinkling streets, filling their lakes, furnishing water for steam boilers for manufacturing establishments, running water motors (page 49–50); it is furnished to consumers to use for any purpose that they please (page 51), at a price charged and collected by defendant (page 50).

3. The Damage to Plaintiffs. The amount of water so diverted by defendant for three years prior to this suit has varied from three million gallons a day to ten million gallons a day (pages 17–18), and amounting in the year 1890, to 1,491,926,000 gallons; in 1891, to 1,983,034,500 gallons; in 1892, to 1,445,604,400 gallons (pages 17–18 and page 50); and in January, 1893, to 91,000,000 gallons (page 50). This action was brought in December 30, 1892.

Making allowance for evaporation and for all causes, the water power of plaintiffs has been deprived by this pumping of ninety-five per cent of the amount pumped (page 25). While this diversion does not decrease, to any great extent, the perceptible depth of the Mississippi River, at plaintiffs' power plants, it very matarially diminishes the water power which plaintiffs would otherwise have had (page 32). During some months of the year there is more water at St. Anthony Falls than plaintiffs can utilize, and during these months the diversion of the amount of power by defendant would occasion less money damage to the plaintiffs than at other times. During the months when the water is not flowing over the dam the diversion by defendant causes a direct pecuniary injury and damage to plaintiffs to the full extent of the value of the amount of water power by which the amount of plaintiffs' water power is diminished page 38). During these months when the water was not running over the dam, plaintiffs had a demand at market rates for more water power than they were able to supply (pages 39, 40 and 41). The loss to plaintiffs is $20.00 a horse power per year; and reducing that figure to gallons, the loss to plaintiffs for every million gallons of water pumped away from their water power has been eighty cents (pages 27 and 38). During the months when the water was not running over plaintiffs' dam, in 1890, plaintiffs' water power was deprived, by diversion of defendant, of 1,044,300,000 gallons (page 32) and during the same period, in 1891, of 1,561,000,000 gallons (page 62). Corresponding results are shown for 1892 (page 32). On account of this diminution of power so caused by defendant, plaintiffs have not been able to supply the demands made upon them by their customers. In the case of the Power Company, deficiency has been made up to customers by supplying them

more water when the Power Company had more to supply (page 32), and in the case of the Mill Company, cash rebates, in the shape of deductions of rentals, have been made to its customers (page 39). When water is short, the more recent lessees are shut off first, on account of the priority rights of others (page 42), and thus the loss comes first on the highest priced customers, as the later leases are at the highest prices (page 42). Besides loss by rebates to regular customers, it has lost by inability to supply excess power at current market rates (page 46).

THE DECISION OF THE STATE COURT.

In the trial court, after plaintiffs' evidence had been offered, the plaintiffs rested, and the trial court ordered a dismissal of the actions. Plaintiffs moved for a new trial, which motion was denied. From that denial they appealed to the Supreme Court of the State, where the order denying plaintiffs' motion for a new trial was affirmed, and the case remanded to the trial court. In the trial court then judgment of dismissal was entered. From that judgment plaintiffs appealed to the Supreme Court of the State, where final judgment was entered in each of said cases affirming the judgment of dismissal; which said judgments of affirmance were ordered and made, for the reasons expressed in the opinion of the Court filed on the appeal from the order denying a new trial (pages 86-88).

The opinion and reasons upon which the judgment was rendered by the State Court are found on pages 76-79 of the record, and are reported in Volume 56 Minnesota Reports, page 485. (See No. "9" Appendix hereto).

The decision is a broad and sweeping one and is based solely upon the ground, first, that the defendant's charter gave it a right to divert the waters and do all the acts complained of by the plaintiffs; and that that charter did not intend to provide for compensation to plaintiffs for the damage occasioned by defendant's diversion; and that the authority given by that charter to the defendant to make the diversion without compensation for damage to plaintiffs' water power, was valid, because the property rights which plaintiffs claimed to have as riparian owners to the use of the water naturally flowing past their lands, were subject to the right of the State to authorize the diversion without compensation; second, that there was nothing in plaintiffs charters which made invalid the authority obtained by defendant under its charter to make the diversion without compensation—that is, that the effect of the authority of defendant's charter was neither (1) to take away the vested property rights obtained by plaintiffs by virtue of their charters, nor (2) to impair the obligation of any contract right belonging to plaintiffs under their charters.

All the questions urged now in this court were urged in the courts below, and besides them other federal questions, which plaintiffs do not at the present time urge.

We confine ourselves to the following propostions of law, which were not only urged in the State Court and passed upon adversely to plaintiffs, but which were also necessarily involved in the decision of the State Court:

1. Plaintiffs have a property right (1) as riparian owners and (2) by virtue of their charters, to the natural flow of the waters of the Mississippi River past their lands, which right is not subject to be diminished by diversion under authority of the State for the general public use of a municipality not in

any wise connected with the preservation and development of the river as a highway, without just compensation; that such a diversion is contrary to the Constitution of the State of Minnesota and the law of property rights governing this property of the plaintiffs, not only under the rules of property existing at the time plaintiffs made these improvements, but also under the rules of law governing plaintiffs' property, as they existed in Minnesota and elsewhere, up to the time of the decision complained of; and that therefore the effect of the statute giving defendant its authority is to take private property of plaintiffs without due process of law, and is therefore repugnant to the provisions of the 14th Amendment to the Constitution of the United States. And further, as corollary to the foregoing, that many of the purposes for which the diversion by defendant is authorized and is made, are not "public" uses, but private uses; and that for that reason, the effect of the charter of defendant is to take private property for private uses without compensation, and is therefore repugnant to the United States Constitution.

2. That the charters of the plaintiffs passed in 1856 gave and guaranteed to plaintiffs the right to use and develop the water power at St. Anthony Falls, the Power Company on the East side and the Mill Company on the West side, and authorized them to build such structures in and upon the river as were necessary to develop that power; and that when those provisions of their charters were accepted and acted upon, they became contract obligations between the State of Minnesota and the plaintiffs; and that the statute authorizing the defendant to take away or diminish in value, by a diversion of the water, the privileges and uses insured to plaintiffs, is invalid and repugnant to Section 10 of Article 1, of the Constitution of the

United States, on the ground that it impairs the obligation of contracts and vested rights granted to the plaintiffs by their charters.

ASSIGNMENTS AND SPECIFICATIONS OF ERROR.

The said plaintiff in error comes and says that in the record and proceedings in this suit in said Supreme Court of the State of Minnesota, there is manifest error in this:

That the said court held the statute of Minnesota entitled, "An act to amend and consolidate an act to authorize the city of St. Paul to purchase the franchises and property of the St. Paul Water Company, and creating a board of water commissioners, approved February 10, 1881, and the act amendatory thereof, approved the 25th day of January, A. D. 1883", approved March 4, 1885, being Chapter 110 of the Special Laws of Minnesota for the year 1885, in so far as it authorized the diversion of water by said defendant in error from the Mississippi River above the water power of plaintiff in error, without compensation to plaintiff in error, to be valid and not in conflict with the provisions of the Constitution of the United States, whereas the said act was invalid and contrary to the provisions of the Constitution of the United States on each of the following grounds: (1) That in so authorizing said diversion the said act of 1885 is contrary to Section 1 of Amendment XIV of the Constitution of the United States, in that it deprives said plaintiff in error of its property without due process of law. (2) That the said act is contrary to the provisions of Section 1 of said Amendment XIV, in that it abridges the privileges and immunities of the plaintiff in error, a citizen of the United States. (3) That the said act is

contrary to the provisions of Section 1 of said Amendment XIV, in that it denies to the plaintiff in error the equal protection of the laws. (4) That said act is contrary to the provisions of Section 10 of Article I of the Constitution of the United States, in that it impairs the obligation of the contract rights of plaintiff in error which are vested in plaintiff in error by virtue of its charter.

For further specification of the errors to be relied upon, under the said assignments, we present the following:

1. There was error in this, to-wit: Plaintiff in error has a property right as riparian owner to the use of all the water naturally flowing past its land, which said right is not subject or subordinate to the uses of the defendant, nor subject to the taking thereof by the authority of the State without compensation; but by and under said judgment the said State Supreme Court held that the said rights of plaintiff in error were subordinate to the uses of defendant and subject to the taking thereof by authority of the State without compensation, and decided in favor of the validity of the authority of said State and the said statute, as interpreted and enforced by the said Supreme Court in its said judgment, authorizing such taking for a public use without making compensation; whereby the said authority of the said State and the said statute of 1885, as construed by said State court, has the effect of taking the private property of plaintiff in error for a public use without compensation, and is thereby repugnant to the 14th amendment of the Federal Constitution prohibiting any State from depriving a person of any property without due process of law.

2. There was error in this, to-wit: Said plaintiff in error has a property right by virtue of its charter to the use of all the

water naturally flowing past its land, not subordinate to the use by defendant nor subject to be taken away by authority of the State without compensation; but the said State Supreme Court held that such property rights of plaintiff in error were subject to such taking, and sustained the validity of the authority and the said statute of 1885 of the State of Minnesota authorizing such taking for a public use without compensation, and by and under said judgment of said State Supreme Court, the said property of said plaintiff in error is thus, under and by virtue of the said act of 1885 of said State, as interpreted and enforced by said Supreme Court of said State in its said judgment, taken for a public use without compensation, and said plaintiff in error is thus and thereby deprived of its property without due process of law, and contrary to the provisions of the 14th Amendment to the Federal Constitution.

3. There was error in this, to-wit: The said State Supreme Court erred in holding that none of the uses made by defendant were "private uses", whereas the record and proceedings show that many of said uses were not public uses but were private uses; and by sustaining the validity of the said statute of 1885 authorizing the said taking without compensation, by and under said judgment of said Supreme Court of said State of Minnesota the private property of said plaintiff in error is, under and by virtue of the authority of said State, and by the said act of 1885, as interpreted and enforced by the said Supreme Court of the State of Minnesota in it ssaid judgment, taken for a private purpose, and said plaintiff in error is thus and thereby deprived of its property without due process of law and contrary to the provisions of the 14th Amendment to the Constitution of the United States.

4. There was also error in this, to-wit: By virtue of the charter of plaintiff in error, plaintiff in error became vested with a contract right from the State of Minnesota to the use of the undiminished flow of the Mississippi River over its said dams for the use of power, which said rights were not subordinate to the use of defendant nor subject to be taken by authority of the State without compensation; but by the said act of 1885, the said contract obligations and rights were taken away and impaired for the benefit of defendant in error without compensation; and by the said judgment of the said State Supreme Court of Minnesota the said act of 1885 was held to be valid and not to impair the obligation of the said contract rights of plaintiff in error under its charter, whereas the said act of 1885, as construed by said court has thereby the effect of imparing the obligation of said contract rights, contrary to the provisions of Section 10 of Article I, of the Constitution of the United States.

Wherefore said plaintiff in error prays that the said judgment of the said Supreme Court of the State of Minnesota be reversed and annulled and that said plaintiff in error be restored to all things lost by reason of said judgment and that judgment be rendered in its favor and against said defendant in error.

It has been agreed that these cases should be heard here and argued together, and we here make, for the purpose of this argument, assignments and specifications of error together for both of the cases under consideration. We do not urge in our argument all of the errors set forth in the original assignments, but only those which go to the invalidity of the statute and authority of the State of Minnesota, attempted to be exercised under the Act of 1885, above specified, on the ground that they are repugnant to the following provisions of

of the Federal Constitution: (1) Section 1 of Amendment XIV, prohibiting any State from depriving a person of his property without due process of law, or denying to any person within its jurisdiction the equal protection of the law; (2) Provisions of Section 10 of Article I prohibiting any State from passing any law impairing the obligation of contracts.

ARGUMENT.

I.

THE QUESTION OF JURISDICTION.

Anticipating the usual objections to the jurisdiction of this court, we will at the outset briefly state the general grounds upon which we claim jurisdiction. The grounds for our claim are such that a discussion of the question of jurisdiction is in itself, to a great extent, a discussion of the merits. Accordingly, if any question as to the jurisdiction is raised, we refer further to the argument and authorities cited under the other part of this brief.

We claim jurisdiction of this court under Section 25 of the Judiciary Act, as amended, providing that "a final judgment or decree in any suit in the highest court of the State, in which a decision in a suit could be had * * * where is drawn in question the validity of the statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity * * * may be re-examined and reversed, or affirmed in the Supreme Court upon a writ of error."

The judgment here in question is the final judgment and decree in these suits in the highest court of the State of Minnesota in which a decision in a suit could be had.

The charter of defendant is a statute of the State of Minnesota, which, as construed by the Minnesota Court in these cases, authorized defendant to take plaintiffs' property without compensation.

The validity of that authority and statute is attacked in this suit by plaintiffs, on the ground that it is repugnant to the Federal Constitution; and the decision in question is in favor of that authority and statute.

The questions raised and objections interposed by plaintiffs, were interposed in the court below. They were directly passed upon by the State Court. More than that the federal questions urged here were necessarily involved in the decision of the State Court.

The record shows, that the effect of the statute, as construed by the State court, is to take away from plaintiffs without compensation their private property, which is vested in them by the laws and decisions, not only of the State of Minnesota, but also by law of property which could not be changed by either the Legislature or Courts of Minnesota; that this taking is not only authorized and done for public a use, but for a private use.

The Constitution of the State of Minnesota, and the laws and decisions of that State have always required and still require that when private property is taken for a public use, just compensation shall be first paid or secured therefor, and that private property cannot be taken for a private use against the will of the owner.

The statute, then, giving authority to defendant, is repugnant to the Constitution of the United States, and particularly to Section 1 of Article 14 of the amendment thereof, in that it deprives plaintiff of their property without due process of law.

Without further citing authorities of jurisdiction on this point, we will cite for the present one case in which jurisdiction under similar circumstances and for similar reasons has been sustained.

Kaukuna Co. vs Green Bay Co., 142 U. S. 254.

Again plaintiffs claim that by the terms of their charters passed in 1856, there was granted and insured to them a vested property right in all the power developed at their dams which could be created by the natural flow of the Mississippi River at that point; and that that was in the nature of a contract obligation and right.

These rights are now diminished and injured by virtue of the authority in the statute charter of defendant passed in 1885. That statute then has the effect of impairing the obligation of the contract rights granted in the charters of the plaintiffs.

This is prohibited not only by the Constitution of the State of Minnesota, but is also contrary to the Tenth section of Article 1, of the Constitution of the United States, in that it is a statute which impairs the obligation of contracts.

It is no answer to the claims for jurisdiction to say that the State Court has construed and determined the rights which plaintiffs got under their charters, and construed these charters in such a way that the later charter of defendant does not impair contract rights under them. These are questions which must be determined and examined by this court.

Bridge Proprietors vs Hoboken Co., 1 Wall. 116.

Piqua State Bank of Iowa vs Knopp, 16 How. 369.

Referring, then, to the following argument for further reasons and authorities sustaining the jurisdiction of this Court in this matter, we proceed to discuss the questions involved upon their merits.

II.

THE STATUTE OF MINNESOTA OF 1885, AS CONSTRUED AND SUSTAINED BY THE STATE COURT, DEPRIVES PLAINTIFFS IN ERROR OF THEIR PRIVATE PROPERTY WITHOUT DUE PROCESS OF LAW.

In order to sustain this proposition, it is necessary only for us to show that the plaintiffs in error have a property right to the use, for power, of all the water naturally flowing in the Mississippi River past their lands, and over their dams; and that this property right was one which was not subject to the right of the State to authorize, without compensation, a diversion of those waters away from the dams and lands of plaintiffs for the uses made of it by defendant.

Without repeating here all the facts necessary to be kept in mind with reference to the situation of plaintiffs and defendant, we wish at the outset to call attention particularly to the undisputed facts shown by the record, that, although the Mississippi River is, generally speaking, a public navigable river, still at the point in question it is not navigable in fact in any sense of the term, but is only navigable for logs and small craft, at, above and below the point in question, by reason of the artificial structures maintained in the river by the plaintiffs. Further, the plaintiffs have been the owners and in possession of the riparian lands in question and all the dams and improvements in question ever since the year 1856; and they have been

and are the owners in fee of all these lands, including all the Islands at and below the Falls at this point. The use to which the diverted waters are put is a use in no wise connected with the navigation of the river, or the improvement of the river in any way. It is a use, which is, in its nature, antagonistic to the preservation of the river as a public highway and is directly contrary to any purpose or intention to use the river for navigation. Under our first proposition, we propose to show:

1.

Whatever rights may be left to the State, in its sovereign capacity or otherwise, to control the bed or waters of a navigable, running stream, and for that purpose to damage riparian owners in their use of the waters of the stream for power, those rights of the State do not extend to the right to authorize a diversion of those waters for purposes not in any way connected with, but in conflict with, the preservation and improvement of the river for the purposes of a public highway, to the damage of riparian owners using the waters for power, unless just compensation is made. As against such diversion, the rights of riparian owners to the use of the water for power, are not such as are within the control of the State, either by its legislature or its courts; they are not rights retained by the State, which the State has to "release" to the riparian owner, nor which the State can restrict. They are well established property rights, by the law of property as established by the fundamental law and decisions of the land. Independent, then, of the property rules recognized by the courts of Minnesota, these rights are to be determined by an examination of the general rules applicable to riparian owners upon

such streams, as shown by the decisions existing at the time when the plaintiffs first became the owners and possessors of these lands and dams, and the general law applicable to their situation since. These rules of law, as shown by the decisions of English and American courts, guarantee to plaintiffs a property right to the use of all the waters naturally flowing past their lands, which is not subject to the right of the State to authorize such a diversion as is made by defendant.

Under this proposition we do not discuss particularly the Minnesota decisions on the subject; for the reason, as stated, that, on account of the peculiar character of the diversion, the property rights of plaintiffs are to be determined by the general law of property rights applicable to riparian owners in their situation.

On account of the distinctions which we here make, it is necessary to recall certain elementary principles applicable to the rights of riparian owners in general, although they have become maxims, and although they are not disputed by the decisions of the Minnesota State court here in question.

Every proprietor on the banks of a running stream has naturally, a property right, as an incident to the land, to the use of all the water naturally flowing past his land without diminution or alteration. This right is a right of property, and as such property it is a part and parcel of the riparian land itself.

3 Kent's Commentaries, 441.

Acquackanonk Water Company vs Watson, 20 N. J. Eq., 369.

Lyon vs Fishmonger's Company, 1 L. R. App. 662.
Cooley Constitutional Limitations, P. 691.

The property right is a right to the *use* of the water, and all the water naturally flowing in the stream. The water itself cannot become the subject of appropriation or exclusive dominion, either by an individual or by a sovereign. Neither sovereign nor subject can acquire anything more than a mere usufructuary right therein.

2 Blackstone Commentaries, 18.
Sweet vs City of Syracuse, 129 N. Y. 316, and cases cited.

The general law thus stated is applicable, as well to public navigable streams and water, both fresh water streams and streams where the tide ebbs and flows, as to private streams.

Lyon vs Fishmonger's Company, I. L. R. App. 662.
North Shore Railroad Co. vs Pion, 14 L. R. App. cases, 612, and other cases cited below.

This usufructuary property right is always subject, both on private and public streams, to the reasonable use by a riparian owner above for his own private purposes; but it is not subject to the consumption by an upper riparian occupant for other than for the domestic uses of his family. A municipal corporation, by acquiring a piece of land upon a lake or river, does not thereby acquire the right to pump the water away from the river for the use of the inhabitants of the municipality, as against the rights of user belonging to the riparian proprietor below.

Emporia vs Soweden, 25 Kan. 417.
Water Company vs Watson, 29 N. J. Eq. 369.
Stein vs Burden, 24 Ala. 130.
Witt & Berks' Canal Nav. Co. vs Swindon Water Works Co., L. R. IX Ch. App. cases (1874) 451.
Reading vs Althouse, 93 Pa. St. 400.

Hall vs Ionia, 38 Mich. 498.
Hough vs Doylestown, 4 Brews. 333.
Mills Eminent Domain, Sec. 79.
3 Kent Com. 439.
Gould on Waters, Sec. 205, 208, 245.
Gilzinger vs Saugerties Water Power Co., 66 Hun. 173.
Mannville Co. vs Worcester, 138 Mass. 89.
Higgins vs Flemington Water Co., 36 N. J. Eq. 538.
Rigney vs Tacoma Light and Water Co., (Wash.) 38 Pac. Rep. 147.
Saunders vs Bluefield, W. W. and Imp. Co., 58 Fed. Rep. 133, 136.
Gardner vs Newburgh, 2 John Ch. 162.
Arnold vs Foote, 12 Wend. 330.
Ætna Mills vs Brookline, 127 Mass. 69.
Bailey vs Woburn, 126 Mass. 416.
Willis vs City of Perry, (Ia.) 60 N. W. Rep. 727.

The four propositions last above stated, and the authorities upon which they are based, which we have cited, were assumed by the Supreme Court of Minnesota, in their decision in these cases, to be as we have above stated them.

The distinction attempted by the Supreme Court of Minnesota in these cases is based, not upon any decision of the State of Minnesota, but upon the general law applicable to public streams; and as to public streams the distinction is claimed, by virtue of the general principles governing those streams, that the rights of plaintiffs to the use of the undiminished flow of the Mississippi past their lands is subject to the right of the State to divert for the uses of defendant without compensation.

An examination of the origin and character of the distinction which exists in this country between the rights of riparian owners upon public streams, and those upon private streams,

is therefore necessary to determine whether plaintiffs' rights were absolute as against the diversion authorized, or were subject to it.

Under the common law waters were divided into two classes, "public" and "private", or "navigable" and "unnavigable", the distinction being based upon the fact of whether or not they were at any time affected by the tide. In those thus classed unnavigable. the riparian owner took to the centre of the stream, owning the land under the water and controlling the water itself, to the exclusion of all uses by others, even for the purpose of navigation; while in those classed navigable, the riparian owner took to the shore, with qualified rights below, and the sovereign retained in the bed and in the waters themselves, both a private property right and a right of control for public use,—a *jus privatum* and a *jus publicum*.

Hale de Juris Maris, Ch. 6 and cases below cited.

This common law distinction and rule of property were in early times attempted to be applied to the great fresh water lakes and streams of this country; but by a wise provision, early adopted by this Court and most of the other Courts of the United States, the common law rule of property was modified. The change arose solely upon the ground, that the common law rule if adhered to would operate to keep the sovereign power from a proper protection of the great natural highways of commerce; and for the purpose that the great fresh water lakes and streams of this country might not come under the absolute control of private owners, and in order that they might be forever kept open for the general public use, for which nature intended them, of public highways, a different rule was adopted; and the classification became one based upon

the actual navigability of the lake or stream. In streams actually navigable, there was retained in the sovereign as original owner and grantor a certain specified interest in the bed and waters of the streams. This interest was in no sense a proprietary one; as the idea of any proprietary interest in the sovereign, either in the bed or in the waters of public streams in this country, has been repeatedly denied by the decisions of this Court and of the different States, and has been repudiated by the Supreme Court of Minnesota.

Gould on Waters, 246.
Angell Water Courses, Sec. 542.
The Genesee Chief, 12 How. 443.
Century Dictionary word "Navigable".
Lamprey vs State, 52 Minn. 181.
Barney vs Keokuk, 94 U. S. 324.
Green Bay Canal Co. vs Kaukauna W. P. Co. (Wis.) 61 N. W. Rep. 1121.
Bradshaw vs Mill Co. 52 Minn. 59.
Att'y Gen'l vs Del & B. B. Ry. Co. 12 C. E. Green (N. J.) 1, same case 12 C. E. Green, 631.

The right reserved to the State is defined as one from which every element of a proprietary interest is absent; it is purely a holding in trust by a sovereign power, not one of appropriation or ownership, nor for any object involving diversion; but one of control simply for certain uses and purposes, from which the very nature of the State's interest excludes the idea of diversion.

Ill. Cent. R. R. Co. vs Illinois, 146 U. S. 387, 453.
Union Depot Co. vs Brunswick, 31 Minn. 297.
Hanford vs Ry. Co. 43 Minn. 104, 112.
Smith vs Rochester, 92 N. Y. 463.
Sweet vs Syracuse, 129 N. Y. 316.
Saunders vs. R. R. Co., 144 N. Y. 75.

Coxe vs State, 39 N. E. Rep. (N. Y.) 400.
Green Bay Canal Co. vs Kaukauna W. P. Co. (Wis.) 61 N. W. Rep. 1121.

These uses and purposes which limit the character and extent of the control of the State over large, fresh waters and their beds are the very ones which first gave rise to the distinction adopted in this country. They are those of keeping the stream open and subject to improvement for a public highway, that is, for the purpose of navigation.

Hanford vs Ry. Co. 43 Minn. 112.
Green Bay Canal Co. vs Kaukauna W. P. Co. 61 N. W. Rep. (Wis.) 1121.
Kaukauna W. P. Co. vs Green Bay Canal Co. 142 U. S. 254.

Wherever other and incidental purposes, such as fishing, bathing, etc., have been recognized as part of the public uses for which the State retains control, they have been those which would not involve any diminution or diversion of the water itself. Any such diminution or diversion would strike at the very basis upon which this sovereign right or trust has been established; for any diversion, however small, is a step towards destruction, and the very idea of destruction or diversion, when referred to streams and lakes, is incompatible with the very basis and reason upon which the State's interest in these fresh waters has arisen,—the preservation and protection of streams and lakes for the use of commerce and for public highways. This inconsistency is not merely theoretical, for experience has shown that in times of low water the pumping of water for such uses from a navigable stream may destroy navigation or injure it to a very large extent.

Philadelphia vs Collins, 68 Pa. St. 106.
Same vs Gilmartin, 71 Pa. St. 140.

In accordance with this distinction and the purposes for which it has been established, the sovereign right of control in the bed and waters of navigable fresh water streams and lakes in this country is one with certain definite limitations. IT IS AND MUST BE LIMITED TO THE CONTROL ONLY FOR THOSE PUBLIC USES WHICH ARE CONNECTED WITH AND CONSISTENT WITH THE PRESERVATION AND MAINTENANCE OF THE RIVER, OR WITH ITS IMPROVEMENT FOR THE PURPOSES OF ITS USE AS A PUBLIC HIGHWAY. To refuse to recognize such limitations, is to yield up to the State an arbitrary control, in the exercise of which the very purpose for which the sovereign has been allowed to retain any interest at all, either in the beds or the waters, may be and undoubtedly would be thwarted. Among the limitations which must be thus placed upon the sovereign's right of control, is that it has not, as such sovereign, an absolute and unqualified right, itself to make, or to authorize others to make, a diversion of the waters of the river for a use, whether it be public or private, which is neither directly nor indirectly connected with or consistent with the purposes of navigation. If the City of St. Paul, or the defendant as its Board of Water Commissioners, can be authorized by the State, by virtue of its sovereign right over the control of the bed and waters of the Mississippi, to make a diversion of ten million gallons of water a day, and carry it around a distance of twelve or fifteen miles away from the natural channel of the Mississippi River, for the purpose of supplying its inhabitants with water, and filling lakes for the purpose of enhancing the landscape and other similar purposes, it can be given the right also to dam the Mississippi or any other "public" stream or lake, and to divert the entire waters of such stream or lake into the St. Paul water shed, or any other water

shed, and away from its natural channel; it can get the right to do this,—if these decisions of the State court are right,—to the entire destruction of the stream for the purposes of navigation, and to the entire deprivation of riparian owners below for any use of the waters for power; and it can get the right thereby to make valueless the immense property interests of the plaintiffs and the industries which for nearly half a century have been and still are dependent upon the water power which nature provided for developing the industries of the country, and upon the faith of which plaintiffs and other business corporations and individuals have invested millions of capital,—all without compensation.

The State cannot possibly be said to have any such paramount right. Its rights as sovereign are limited. The limitation excludes the right claimed by the State in these cases. Where the limitation of the sovereign right of the State ends, there the property right of the riparian owner begins. Attached to his riparian lands he has all rights in the stream, the exercise of which would not conflict with its use or control for the purposes of commerce; and these rights are none the less property rights because his absolute fee in the bed of the stream may have been limited.

Schurmier vs Ry. Co. 10 Minn. 82. (Gil. 59.)
Ry. Co. vs Schurmier, 7 Wall. 272.
Yates vs Milwaukee, 10 Wall. 497.
Pompelly vs Green Bay Co., 13 Wall., 166.
Foster vs Bank, 57 Vt. 128.
Eaton vs B. C. & M. R. R. Co., 51 N. H. 504.
Ten Eyck vs Del. Raritan Canal Co., 18 N. J. L. 200.
Canal Co. vs Jersey City, 26 N. J. Eq. 294.
Lyon vs Fishmongers Co., 1 L. R. App. 662.
No. Shore Ry. Co., vs Pion, 14 L. R. App. Cases 612.

Morrill vs St. A. F. W. P. Co., 26 Minn. 222.
Wait vs May, 48 Minn. 453.
Hanford vs Ry. Co., 43 Minn. 104.
Myers vs St. Louis, 8 Mo. App. 266.
Cooley Const. Limitations, p. 691.

It may be true that, in accordance with the doctrine laid down by this court in the case of *Hardin vs Jordan, 140 U. S. 371*, and *Packer vs Bird, 137 U. S. 661*, the State, by its legislature or its courts, may have a right to "release" to the riparian owner, and add to the riparian owner's absolute right of property, certain interests in the bed of the river below high water mark, and also add to the uses of the water in the river itself, certain interests which would not, except by favor of the State, belong to the riparian owner. But the State cannot release to the riparian owner, or control or restrict the riparian owner, in the use of any of those rights or interests, which did not belong to the State as sovereign or otherwise. This point is next discussed as a separate proposition; but is mentioned here as important at the present point of the discussion.

Beyond the riparian owner's absolute ownership, which he would have without the sanction of the State, certain concessions or as they are termed in the Hardin and Packer cases, "releases," have been granted or allowed to the riparian owner in the nature of an absolute control of the land below high water mark, and of the waters of the river as against what would otherwise have been the absolute control of the State for the purpose of navigation; and it is for that reason that in different states the line of absolute ownership and control in the bed and waters below ordinary high water mark varies, some leaving it only at the high water mark, some extending it to low water mark, and some extending it to the

entire bed of the stream. But in spite of this difference in the extent of the limitation placed upon his fee, the riparian owners' rights to the use of the waters, as against a diversion by the State for purposes other than for navigation, remain the same in all jurisdictions. All limitations, in so far as they are left in force upon what would otherwise have been the absolute property of the riparian owner in case the stream had been private and unnavigable, are limitations placed and reserved for the one purpose of preserving to the State control of the stream for the purposes of navigation; and the sovereign power of control for those purposes remains the same in all and subject in every case to the limitations which we have defined. As was recently said by the New York Court of Appeals, though the State may acquire a mere usufructuary right to the use of the water for any purpose, it could not acquire either as owner or sovereign the ownership of the aggregated drops that comprise the mass of flowing water in a lake or its outlet, and whatever the status of title in the bed, whether it be held to be in the riparian owner or in the state itself, the *diversion* of the water is an infringment of the property rights of lower proprietors to the use of the water.

Sweet vs. Syracuse, 129 N. Y. 316.
North Shore Ry. Co. vs. Pion, 14 L. R. App. Cases 612.

Subject only to the State's power of control for the uses of navigation (and if for any other uses, then only those that are consistent with the preservation of the stream for navigation) the riparian owner has the right to use the water of these streams which naturally flows past his riparian land for manufacturing and other purposes, and to go upon the bed of the stream and build structures necessary to make the use of the waters available. All facilities afforded by the natural con-

dition of the stream or lake adjacent to the riparian land, whether for water power or other uses, and whether developed or undeveloped, are not mere temporary and uncertain privileges but belong to the riparian land and are the private property of the riparian owner; and they cannot be taken away from him by a diversion for the use of municipalities, except by proper proceedings and upon the payment of just compensation.

Yates vs Milwaukee, 10 Wall. 497.
Hanford vs Ry. Co. 43 Minn. 104, 112.
Gould on Waters, Sec. 204.
N. Y. Rubber Co. vs Rothery, 132 N. Y. 293.
Smith vs Rochester, 38 Hun. 612.
Canal Co. vs Jerssey City, 26 N. J. Eq. 294.

These rights of the riparian owner are not generally subject to any right of the State to *divert* the waters from their natural channel for even the purpose of navigation without making compensation; but where any paramount right to a diversion for any purpose has been recognized, (*Falls Manufacturing Co. vs. Oconto Im. Co. (Wis.) 58 N. W. Rep. 256*), it has been strictly confined to the purpose of navigation and to the extent actually necessary for that purpose alone.

Green Bay Canal Co. vs Kaukauna Co. (Wis.) 61 N. W. 1121.

The property rights of the riparian owner to the use of the water being thus qualified only by the sovereign power of control which, from its nature, excludes the idea of destruction or diversion, the right which municipalities have or can obtain to divert water for public use to the damage of lower proprietors, remains the same in the case of navigable streams as in the case of those which are private or unnavigable. The municipality or public water works company has not, and can-

not obtain, any right to divert navigable fresh water for public supply to the damage of lower riparian owners, without making compensation in duly authorized proceedings.

Cooley Const. Lim. p. 691.
Gould on Waters, Sec. 204.
Angell Water Courses, Chap. XI.
Smith vs. Rochester, 92 N. Y. 484.
Sweet vs. Syracuse, 129 N. Y. 317.
Meyers vs. St. Louis, 8 Mo. Ap. 266.
Walker vs. Board of Public Works, 16 Ohio 540.
Saunders vs. R. R. Co., 144 N. Y. 75.

The only exceptions to the rule thus stated, arise in certain instances in the states of Pennsylvania, New York and Massachusetts.

In Pennsylvania the old rule of "proprietary" interests in the state to the bed and to the water itself in tidal waters, has in effect been applied to navigable fresh waters, and the riparian owner on such waters has never been recognized as having the riparian rights which have always been the rule of property in other states. This is exceptional and arises from the peculiar colonial grants under which the state was settled.

Rundell vs. Del. and Raritan Canal Co. 14 How. 80; 1 Wall. Jr. 275.
Monongahela Nav. Co. vs. Coons, 6 W. & S. 101.
Shrunk vs. Schuylkill Nav. Co. 14 S. & R. 71.
Canal Co. vs. Wright, 9 W. & S. 9.
McKeen vs. Canal Co. 49 Pa. St. 424.
Philadelphia vs. Collins, 68 Pa. St. 106.
Philadelphia vs. Gilmartin, 71 Pa. St. 140.
Fulmer vs. Williams, 122 Pa. St. 191.
Williams vs. Fulmer, 151 Pa. St. 405.

Again in New York, in certain cases upon the Mohawk and Hudson rivers, on account of the early grants by which

the State of New York acquired jurisdiction over those rivers, a certain interest of a proprietary nature has been said to belong to the State in addition to its general rights as sovereign. And on these streams and for these particular reasons many of the early New York cases recognize a right as remaining in the State to divert, and to authorize a diversion of, the waters of these streams without providing for compensation for damages to lower proprietors. If authority at all, these cases must be considered simply as decided under an exceptional state of facts. But they have been repudiated by the highest Court of New York, as shown by many recent decisions. In one of these decisions (the Rumsey case) the New York Court of Appeals says, that since the time of these early decisions these questions of riparian rights and of the interest of the State in the control of navigable waters, "have been elaborately examined, discussed and settled in all the courts", and it is clearly shown that the Courts of New York do not recognize these early cases as authority even as to the rights of riparian owners upon the Mohawk and Hudson rivers, to which streams those cases were confined. The general rule in New York both as to the rights of riparian owners and as to the extent of the control which the State has in navigable waters is now the same as in other States.

Gould vs R. R. Co. 6 N. Y. 522.
People vs Canal Appraisers, 33 N. Y. 461.
Crill vs City of Rome, 47 How. Rep. 398.
People vs Tibbetts, 19 N. Y. 523.
Smith vs Rochester, 92 N. Y. 463.
Rumsey vs R. R. 133 N. Y. 79.

In Massachusetts there is an exceptional line of decisions which are based also upon peculiar grants by which the State acquired jurisdiction over the territory and the waters in question.

The right of the State in the "great ponds" of Massachusetts has been a fruitful source of discussion and litigation. By virtue of a colonial ordinance of 1647 and the early grants referred to, in Massachusetts, the State is held to have a proprietary title and interest in the great ponds of the state, which is similar to the interest obtained by an individual grantee, like that, for instance, of the grantees of Humphrey's pond, situated in Lymfield and Danvers. This leaves in the State a peculiar jurisdiction and power over those great ponds. It is something entirely different and of much broader scope than the sovereign interest or power of control which is reserved to other States in their navigable waters for the purpose of navigation; and has arisen in an entirely different way. Every riparian owner upon a great pond, or upon a stream issuing from a great pond, in the State of Massachusetts takes and uses the water for power or other purposes, subject to this extraordinary power and title which has been retained in the State. The State, then, may authorize a diverison of the waters from such a pond for the purpose of public water supply, and may use its discretion as to whether or not, it will require the payment of compensation for damages to lower proprietors. So, in a decision rendered in 1883, it was held that the act of the State Legislature of 1871 authorized the city of Fall River to take water from Watuppa pond for public supply; but as the act provided that compensation should be made for damages to lower mill owners, it was held that such compensation must be made. Under this act the city of Fall River paid for the right to take one and one-half million gallons a day; but to supply an increased demand, the city obtained passage of another act in 1886, which authorized it to make further abstraction or diversion of the waters of this pond,

and in this act it was expressly provided that the city should not be compelled to pay compensation for damages to the lower proprietors. The Supreme Court of Massachusetts held, by majority decision, that, on account of this extraordinary proprietary right which had been reserved to the State it had the power through its Legislature to authorize a diversion without providing for compensation. This latter decision is, in many places, spoken of as an overruling of decision made five years before; but a careful consideration of it shows that the difference in the result was due solely to the fact that in one act of the Legislature the State had made compensation as a condition for the taking, and in the later act it had expressly provided that compensation need not be made. The only reason why the Court claimed for the State the power to use its discretion in a matter of requiring compensation was the fact, that by virtue of the early colonial grants and the ordinance of 1647, it had a proprietary interest in waters of the great ponds, which other States, except in those instances which we have named, do not have; and this is the only ground on which any such discretion could be based. It cannot be based on any distinction between riparian rights on lakes and ponds and those on running streams.

Watuppa Reservoir Co. vs. Fall River, 147 Mass. 548.
Watuppa Reservoir Co. vs. Fall River, 134 Mass. 267.
3 Harvard Law Review 1.
Lamprey vs. State, 52 Minn. 181.

These exceptional decisions have been expressly repudiated by the Supreme Court of Minnesota. That Court has said:

"The old common law doctrine, or at least what has been generally assumed to be such, and which was adopted in some of the early American colonies, that the crown had a *jus privatum*, or right of private property, in navigable waters and their

shores, which it could alienate to a subject has no place in the jurisdiction of this State.

"It is the settled law with us that the rights of the State in navigable waters and their beds are sovereign and not proprietary, and are held in trust for the public *as a highway*, and are incapable of alienation."

Bradshaw vs. Duluth Imperial Co., 52 Minn. 59, 65.

In order to make our list of exceptional decisions complete, we next refer to a decision of the Vermont Supreme Court which is the only decision in any way appearing to contradict the doctrine laid down in the case of *Emporia vs Soden*, already cited. This Vermont case involved the question of the right of an upper municipality to divert for city use the waters of a small, unnavigable stream to the damage of a lower municipality using the waters of the same stream for the same purpose. The statement is made in the decision that, what an upper individual riparian owner could do, a municipal corporation could do, in behalf of its inhabitants collectively, whether those individual inhabitants are riparian owners or not; but the facts in the case show that it cannot be cited as authority against what is contended for now by these plaintiffs in error. That decision may logically be cited as establishing a rule as between two municipalities on the same stream, but for nothing further. It can have no weight in these cases, for the Minnesota Supreme Court, in its decision in these cases, assumed the general rule laid down in the case of *Emporia vs Soden* to be the law.

Barre Water Company vs Carnes et al., 65 Vt. 626.

The case of *Mayor vs Spring Garden, 7 Pa. State 348*, is also not contradictory to the rule laid down in *Emporia vs Soweden*, for the reason that the *Spring Garden* case was a case of a diversion from a navigable river allowed without compensa-

tion, in accordance with the exceptional state of affairs existing in Pennsylvania which has already been pointed out.

Without, then, going into the Minnesota decisions upon the subject, and without considering whether, in case it was within the power of the legislature and courts of Minnesota to establish a different rule, they have attempted to do so—what has already been said points unmistakably to the conclusion which we have drawn from the authorities already cited, to-wit: That the general principles of law governing the property rights of plaintiffs in 1856, and up to the present time are, as against this diversion, such that they cannot be prejudiced by any court decision or statute of the state of Minnesota, and that, as against the diversion authorized by the statute of 1885, the plaintiffs had a vested property right as riparian owners to the use of all the waters in the river for the purpose of their water power, which right could not be taken away or diminished for the purposes of defendant without just compensation.

2.

The doctrine of this court, in the cases of Hardin vs. Jordan and Packer vs. Bird, to the effect that the extent of the prerogative of the State to the lands under water upon a navigable stream depends upon the laws of each State, does not leave it to the legislature or courts of Minnesota to determine, beyond the power of review by this court, that the prerogative of the State extends to the diversion of the waters for purposes other than those of navigation and to the damage of lower proprietors.

This point has already been touched upon; but we wish to emphasize it in this part of our argument.

After discussing the principles of public policy, which

have reserved to the state, as sovereign, a certain control in the beds and waters of navigable, fresh streams and lakes in this country, this court says in *Barney vs. Keokuk.*

"If they (the states) choose to resign to the riparian proprietors rights which properly belong to them in their sovereign capacity, it is not for others to raise objection."

Barney vs. Keokuk, 94 U. S. 324, 338.

And again: "The Courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grant; but whatever incidents or rights attach to the ownership of the property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee."

Packer vs Bird, 137 U. S. 661, 667.

It is also said: "It depends upon the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised."

Hardin vs Jordan, 140 U. S. 371, 382.

But in all these cases, the discussion was as to the rights which the State had reserved to it in the lands below ordinary high water mark; and the discussion was as to what rights the State could exercise over those lands and the waters upon them in regard to the control of the waters, when left in their natural condition, or as to changes for the purpose only of navigation. It was a discussion of what rights, (which would otherwise belong to the State as sovereign or otherwise), the State could release to the riparian owner or restrain the riparian owner in the use of. There is nothing in these decisions which can be cited in support of the proposition that there is left to

the State the right to take the waters of a natural stream away from its natural channel, to the injury of riparian proprietors using the water for the purposes of power, and arbitrarily devote them to uses which are inconsistent with the purpose of navigation, without making compensation to the riparian owner. As we have already attempted to show, as against any such attempted diversion, the rights of the riparian proprietors are those which attach as property rights to their lands; and as against those property rights of the riparian owner, the prerogative right of the State to divert the water for the purposes shown in the cases at bar does not extend. The assertion of such a prerogative is one which impairs the right of the riparian owner, and lessens the rights which he has by virtue of his riparian land. All this riparian land of these plaintiffs came to them almost directly by the grants from the United States government. Those grants do not reserve to the sovereign the right claimed by defendant in these cases. The State of Minnesota, therefore, as sovereign, never acquired such a right. And this court will examine and determine upon the limitations of the prerogative right which has been acquired and now held by the State. In defining the source and limitations of the sovereign power of the State in the bed and waters of navigable streams, this Court has said:

"It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either to the waters or the soils under them."

This Court further says:

"The courts of the United States will construe grants of the general government without reference to the rules of construction adopted by the States in their grants; but whatever incidents or rights attached to the ownership of the property

conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants and the use and enjoyment of the property by the grantee. As an incident to such ownership the right of the riparian owner where the waters are above the influence of the tide, will be limited according to the law of the State, either to low or high water mark, or will extend to the middle of the stream."

Packer vs Bird, 137 U. S. 616.

These decisions, together with other decisions of this Court, like the Illinois Central Railroad decision, above cited, show that limitations have been placed upon the prerogative right of the State, and that those limitations exclude the right of the State to divert the waters for the purposes like those shown in the cases at bar.

The Legislature and the State Courts, then, cannot assert a prerogative right to divert the waters of a navigable stream for the purposes shown in these cases without taking away property rights of riparian owners situated as plaintiffs are. Accordingly, it is not in these cases necessary to go any further in our argument, in order to show that private property has been taken without due process of law.

But we will next assume for the purpose of the argument of our next two propositions, that the State of Minnesota as against the riparian rights claimed by the plaintiffs to the use of the water for power, had the right to assert and hold to itself the prerogative to make the diversion complained of; and we shall show (1) that by its Legislature the State of Minnesota in 1856 gave and released forever to these plaintiffs such rights and privileges, that from the time of their charters they have held the right to use all of the water naturally flow-

ing in the river past their lands for the purpose of power, free from the right of the State to divert in the manner complained of without making compensation; (2) that under the Law of the State of Minnesota as shown by the decisions of its highest Court, in regard to the rights of riparian owners upon navigable streams, and especially in regard to the rights of these plaintiffs upon the stream, the State of Minnesota has fixed in plaintiffs the property rights which they here claim to the use of the water.

3.

Even if the State of Minnesota would otherwise have had and retained a prerogative right to make the diversion complained of, it granted and released to plaintiffs by their charters such rights and privileges as gave to plaintiffs a property right to the use of all the natural flow of the Mississippi past their lands for power, which the State could not thereafter take away or diminish without making compensation.

The provisions of the charters of plaintiffs which were passed by the Territorial Legislature in 1856 have already been quoted, and they are shown in full in the Appendix hereto attached. This was a law and grant which it was within the power of the Territorial Legislature to make.

See Organic Act of Minnesota Appendix hereto.

These grants became binding upon the State of Minnesota after its organization.

See Act authorizing State government, Constitution of Minnesota, and Act of Admission into Union, Appendix hereto.

The record shows that immediately upon the passage of these charters, the plaintiffs entered upon the maintenance and improvements of the water power and have ever since maintained it at great expense (page 26, Transcript). These acts constitute an acceptance of the grant conferred by the State; and having thus been acted upon, the grant was irrevocable, so far as any attempted revocation should be injurious to the plaintiffs in the exercise of the rights conferred by the charter.

Shively vs Bowlby, 152 U. S. 1.
Monongahela Nav. Co. vs U. S. 148, U. S. 312.
Boyd vs U. S. 116, U. S. 616.

The Minnesota courts have always recognized the rights of plaintiffs to maintain the dams and to use the power in the river.

Morrill vs St. A. F. W. P. Co., 26 Minn. 222.
State vs Minneapolis Mill Co., 26 Minn. 229.
St. A. F. W. P. Co. vs Minneapolis, 41 Minn. 270.

Indeed, in the very decisions in these cases, the Supreme Court of Minnesota says:

"Appellants are corporations created in 1856, by acts of the Territorial Legislature, and authorized to build and maintain dams in the Mississippi river at the Falls of St. Anthony, about ten miles above St. Paul, for the development of water power and for the use and sale of such power. One of these corporations, owning the shore on the East side of the river erected a dam to the proper point in the river channel, and the other, owning the West shore built its dam so as to connect the two, thus forming a power, which has ever since been maintained and used."

Page 77 Transcript in these cases. (56 Minn. 485).

Still in a further part of the same decision the State court holds that

"The rights under their charters are, equally with their rights as riparian owners, subordinate to these public uses."

This part of the decision in which the plaintiffs rights under their charters are held to be subordinate, is not binding upon this Court at this time, as it is one of the very questions to be determined. We are not now urging these provisions of the charters of plaintiffs on the ground of contract rights; but on the ground that if the State had rights reserved to itself over the flow and use of the waters of the river, it released them to plaintiffs by the grant in these charters which gave to plaintiffs a property right, and which could not be taken away or restricted thereafter, without making compensation. This being a property right and the statute of 1885 diminishing it without compensation, that statute operates to deprive the plaintiffs of their private property without due process of law.

4.

If the question of plaintiffs' property rights to the use of the water for power is to be determined by the decisions of the Supreme Court of the State of Minnesota, these decisions, from the first to the last, show, that the riparian rights claimed by plaintiffs were property rights and were not subject to be taken away or diminished by the State for any purpose, without compensation.

Up to the time of the decision in question, there was nothing in the decisions of the Supreme Court of the State of Minnesota to indicate that any such rule as is laid down in the decision in the cases at bar would or could be asserted by the State. The decision in these cases does not contain one single citation from Minnesota, or from any other jurisdiction. No attempt is made to base this decision upon anything which the

Supreme Court of Minnesota has ever before said upon the subject of riparian rights in navigable streams.

On the contrary, all previous decisions of the Minnesota Supreme Court upon the subject had not only pointed directly to the rule of property which is contended for in these cases by plaintiffs, but those decisions had clearly fixed and established the rule of property which we contend for. And among those decisions are several which apply to these very plaintiffs in regard to the identical riparian rights which are here in question.

As a rule of property, the State Supreme Court has decided that riparian owners on a navigable stream hold the fee to low water mark. They hold an absolute and unqualified fee to ordinary high water mark. Between ordinary high water mark and low water mark, the fee is qualified to the extent that it is subject to the use and control of the State over the bed and waters for the purpose of navigation.

Schurmier vs R. R. Co., 10 Minn. 82 (Gil. 59).
Wayzata vs Ry. Co., 50 Minn. 438 (52 N. W. 913).
Wait vs May, 48 Minn. 453.
In re Minnetonka Lake Improvement, 56 Minn. 513.
Also decisions cited below.

Without further comment at the present time, we now call attention to the course of decisions of the Supreme Court of Minnesota, upon the subject of riparian rights upon navigable streams. They all lead down to the result which is stated below in the Hanford case; and the inevitable conclusion deducible from these decisions is:

THE DECISIONS OF MINNESOTA HAVE FIXED AND ESTABLISHED IN THE RIPARIAN OWNER UPON A NAVIGABLE STREAM THE PROPERTY RIGHT TO THE USE OF ALL THE WATER FLOWING

PAST HIS LANDS FOR THE PURPOSE OF POWER, AND TO GO UPON THE BED OF THE STREAM AND ERECT STRUCTURES TO IMPROVE THAT POWER; AND THAT ALL THE POWER AND ADVANTAGE AFFORDED BY THE NATURAL FLOW OF THE RIVER OPPOSITE HIS LAND BY MEANS OF THOSE STRUCTURES ARE VESTED, PRIVATE PROPERTY RIGHTS, WHICH CANNOT BE TAKEN AWAY FROM HIM BY THE STATE FOR ANY USE, WITHOUT COMPENSATION; AND, FURTHER, AS REPEATEDLY STATED IN THE HANFORD CASE, THOSE PRIVATE PROPERTY RIGHTS OF THE RIPARIAN OWNER ARE SUBORDINATE ONLY TO THE SOVEREIGN POWER AND CONTROL OF THE STATE OVER THE BED OF THE STREAM FOR THE PURPOSES ONLY OF NAVIGATION.

We quote from the decisions:

In 1865 in the case of Schurmier vs St. Paul & Pac. Ry. Co. the Supreme Court of Minnesota said:

"The further question is presented whether the riparian owner takes to high water or low water mark, or to the middle thread of the stream. At common law, grants of land bounded on rivers above tide water, carry the exclusive right and title of the grantee to the middle thread of the stream, unless an intention on the part of the grantor to stop at the edge or margin is in some manner clearly indicated; except that rivers navigable in fact are public highways, and the riparian proprietor holds subject to the public easement. In this case no intention is in any way indicated to limit the grant to the water's edge, and if the common law prevails here, Roberts, by his purchase, took to the centre of the river, including the land sebsequently surveyed by the government—called Island No. 11—and which is now claimed by the defendants. The common law of England, so far as it is applicable to our situation and governments, is the law of this country in all cases in which it has not been altered or rejected by statute, or varied by local usage under the sanction of judicial decisions. 2 Kent Com. 27–8.

"We think, in respect to the rights of riparian owners it is as applicable to the circumstances of the people in this country as in England. It is not true in fact, as has been alleged,

that the navigability in fact of a river above the flowing of the tide is a state of things unknown to or unprovided for by it. See Hale, Treatise De Jure Maris, etc., part 1, ch. 3. In its application to cases like the one under consideration it has not been varied or rejected in this state, and the few states of the Union that have repudiated it are exceptions to the general rule. Jones vs Soulard, 24 How. U. S. 41 and cases cited in brief of counsel of defendent in error; Gavit vs Chambers, 3 Ohio, 496; Middleton vs Pritchard, 4 Ill. 510; Ex Parte Jennings, 6 Cow. 518 and note; Palmer vs Mulligan, 3 Caines, 318 and note; 3 Kent Com. 427 et seq., and cases cited in note; 2 Smith's Lead. Cas. 217–227; Angell Water Courses, ch. 1, and cases cited; 2 Wash. Real Prop. 632 and notes.

"Some—we believe most—of the authorities that deny that the riparian proprietor owns to the middle thread of the stream, holds that he takes to the low water mark. See Halsey vs McCormic, 13 N. Y. 296; Morgan vs Reading, 3 Sme. & Mar. 366; Child vs Starr, 4 Hill 369; Blanchard vs Porter, 11 Ohio 138; 2 Smith Lead. Cas. 224–6, and cases cited. This we think would include the land claimed by the defendant, and designated "Island No. 11." We hold therefore, that by the patent to Roberts, the United States conveyed to him said "island."

"We think no reason can be given why the same rule should not apply to grants made by the government that are applicable to grants made by individuals. Section 9, of the act of congress, first above cited, provides that all navigable rivers within the territory to be disposed of by virtue of that act, shall be "deemed to be and remain public highways." At common law rivers navigable in fact are public highways and the riparian owner holds subject to the public easement. This act of congress, therefore, is merely a declaration or affirmance of the common law and not a modification of it. The fact that these rivers are, and must remain public highways, is not at all inconsistent with the view, that riparian owners have the fee of the bed of the stream. Peck vs Smith, 1 Conn. 133."

Schurmeir vs St. Paul & Pacific R. R. Co., 10 Minnesota, 82–102 (59–75).

In 1876, in case of Brisbine vs St. Paul & S. C. R. R. Co., the Minnesota Court said: Quoting first from the syllabus, which in Minnesota is prepared by the Supreme Court:

(Syllabus),—"The owner of a piece of land bordering on the Mississippi river, purchased from the United States, and comprising a block of land in a city, and a narrow strip between such block and the river, continues to be a riparian proprietor, though such strip has become a public street by a common law dedication; and even after he has conveyed such block, describing it in his deed as extending to the street, he continues to be a riparian proprietor in respect of his ownership of the fee of that half of the street between the center thereof and the river. As such riparian proprietor he holds the fee to low-water mark, *subject to the public easement of navigation*, and with all the rights of other riparian owners as detailed in the opinion; and he is entitled to compensation in respect of those rights, from a railway company that seeks to condemn for the purpose of its railway, the land between the center of the street and the center of the channel of the river.

(Decision),—"In this latter case the absolute title in fee of all the land between such dividing line and the river at low-water mark undoubtedly remained in the plaintiff, together with all such riparian rights as follow the ownership of real estate bordering upon a navigable stream. What these rights are, especially in regard to land acquired originally from the United States, and bordering, as this does, upon the Mississippi river, we regard as fully and correctly settled by the Federal Supreme Court. Dutton vs Strong, 1 Black 23; Railroad Co. vs Schurmeier, 7 Wall. 272; Yates vs Milwaukee, 10 Wall. 497. According to the doctrine of these decisions, the plaintiff possessed the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain, for his own and the public use, suitable landing places, wharves, and piers, on and in front of his land, and to extend the same therefrom into the river, to the point of navigability, even though beyond low-water mark, and to this extent exclusively to occupy, for such and like purposes, the bed of the stream, *subordinate and subject only to the navigable rights of the public, and such needful rules and regulations for their protection as may be prescribed by competent legislative authority. The rights which thus belonged to him, as riparian owner of the abutting premises, were valuable property rights, of which he could not be divested without consent, except by due process of law, and if for public purposes, upon just compensation.* Yates vs Milwaukee, 10 Wall. 497.

"If, as is claimed by defendent, Water street was in fact a street lawfully dedicated to public use as such, whatever its actual width—whether occupying the whole or only part of the intervening space between the block and the river—the fee of the south or river-side half thereof remained in the plaintiff subject only to the specific easement created by the act of dedication. Banks vs. Ogden, 2 Wall. 57. No additional servitude could be imposed upon it against his will, except for some public purpose, and upon compensation as provided by law. The company had no right to occupy it for the purposes of its road, nor could it acquire any such right from the city of St. Paul. Gray vs. First Div. St. Paul & Pacific R. Co., 13 Minn. 315; Schurmeier vs. St. Paul & Pacific R. Co., 10 Minn. 82. Being such owner in fee of this half of the street, even though no soil was left remaining between it and the river at low-water mark, he was a riparian proprietor of land bounded by a navigable stream, and certainly possessed of all the rights appurtenant to such ownership. Banks vs. Ogden, 2 Wall. 57; Yates vs. Milwaukee, 10 Wall. 497."

Brisbine vs St. P. & S. C. R. Co., 23 Minn. 114.

In 1879, in the case of *Morrill vs St. A. F. W. P. Co.*, the rights of this plaintiff in error, the St. Anthony Falls Water Power Company, were further discussed. The Supreme Court said: Quoting first from the syllabus:

(Syllabus),———"The riparian owner upon a navigable stream may use the water flowing past his land for any purpose, so long as he does not impede the navigation, in the absence of any counter claim by the State or United States.

(Decision),———"We do not intend to discuss the question whether riparian owners have rights in navigable waters, absolute as against the State, and which the State cannot take away without making compensation. That they have rights absolute as to every one unless the State, is undoubted, and the proviso was inserted to save those rights.

* * * * * * * * * * *

"It is now settled by the decisions of the court of last resort that under the acts of congress providing for the survey and sale of the public lands, the patentees of lands bordering on the Missi sippi river, and its tributaries take only to the stream

—at furthest, to low water mark—leaving the title to the bed of the stream below low water mark in the government. Those streams, below low water mark, stand, therefore, in respect to the rights of the government and individuals in them, the same as tidal rivers. The rights of riparian owners are the same in both.

"Owners of lands bordering on navigable rivers and lakes—those navigable in the common-law sense, and those navigable under acts of congress—have rights in respect to the waters of such rivers and lakes, *peculiar to such owners, and not possessed by others.* Dutton vs Strong, 1 Black, 23; Railroad Co. vs Schurmeir, 7 Wall. 272; Yates vs Milwaukee, 10 Wall 497; Rose vs Groves, 5 Man. & Gr., 613; Duke of Buccleuch vs Metropolitan Board of Works, L. R. 5 H. L. 418; Metropolitan Board of Works vs McCarthy, L. R. 7 H. L. 243; Lyon vs Fishmongers' Co., 1 L. R. App. Cas. 662; Delaplaine vs Chicago & Northwestern Ry Co., 42 Wis. 214; Brisbine vs St. Paul and Sioux City Ry Co., 23 Minn. 114. The case of Atlee vs Packet Co., 21 Wall., 393 does not deny this proposition. It decides that the riparian owner, as such, has no right to construct piers in the navigable portion of such a river, and is entirely consistent with Dutton vs Strong, 1 Black, 23, which affirmed the right to construct a pier or wharf out to the point of navigability.

"No case or text book that we have found has attempted to define or limit the uses which the riparian owner may make of navigable waters, as those waters are seldom capable of any use except for navigation. Whenever specific riparian rights have come in question, they have generally been connected with navigation, such as the right to construct and maintain wharves and piers for access from the land to the water. Other cases, like Railroad Co. vs Schurmeir, 7 Wall. 272, and Brisbine vs St. Paul & Sioux City R. Co., 23 Minn. 114, have mentioned the right to construct wharves and piers, not to confine riparian rights to such structures, but to illustrate the proposition that the owner of the banks has peculiar rights in the stream.

"There is a class of cases, among them Lansing vs Smith, 4 Wend. 9; People vs Tibbetts, 19 N. Y. 523; Gilman vs Philadelphia, 3 Wal. 713 which hold that riparian rights in navigable waters are subordinate to those of the State, and cannot in any manner interfere with the exercise of such

public rights. These latter cases have no bearing on this, for here there is no attempt by the State to exercise the public power.

"There are several cases in which the courts, *arguendo*, have indicated that the owner of the bank may make any use of the water adjoining his land not inconsistent with the public right, nor in opposition to the state. The only statement of a foundation for such a right, that we can find is in the opinion of Lord Selborne in Lyon vs Fishmongers' Co., I. L. R. App. Cas. 662, where he says "the rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturae*, because his land has by nature the advantage of being washed by the stream."

"In People vs Tibbetts, 19 N. Y. 523, it is said: "The riparian owner may undoubtedly use the water passing or adjoining his land for his own advantage, so long as he does not impede the navigation, in the absence of any counter claim by the state as absolute proprietor." In Delaplaine vs Chicago & Northwestern Ry. Co., 42 Wis. 214, "all the facilities which the location of his land with reference to the lake affords, he has the right to enjoy, for purposes of gain or pleasure. * * * These rights of user and exclusion are connected with the land itself, grow out of its location, and cannot be materially abridged or destroyed, without inflicting an injury upon the owner which the law should redress." And in Canal Appraisers vs The People, 17 Wend. 571, Senator Tracy, in support of the right of the state to interfere with riparian rights without making compensation, said: "We may also take the case of the tide mills on Long Island, where the owners of the lands on the inlet of the sea possess an undoubted right to use the water for their private emolument, and where the capability of availing themselves of this water-power may constitute the chief value of the adjacent land."

"Dutton vs Strong, 1 Black, 23 affirmed the right of a riparian owner on a navigable lake to build and maintain, for his own exclusive use and benefit, a pier into the lake as far as the point of navigability. The right to encroach upon the shallow water of the lake, by an exclusive appropriation even of the underlying soil, must rest upon the proposition that the riparian owner may make any use of the lake or river opposite his land not inconsistent with the public right.

"As it seems to us, none of these opinions state the right

too strongly. If the right exists, *jure naturae*, because the land has, by nature, the advantage of being washed by the stream, it is impossible to see how any such distinction as defendant claims can be made as to the peculiar uses which the riparian owner may make of the waters. *The limit to the private right is imposed by the public right, and the private right exists up to the point beyond which it would be inconsistent with the public right.*

"We think the right in the riparian owner to put the water to any useful purpose may be sustained by considerations of public policy. It is certainly for the interests of the public that where the waters of a navigable stream may, without interfering with the public right, be put to some useful purpose, the right to so use them should exist.

"We will state the rule at which we have arrived nearly in the language of the Court in People vs Tibbetts, 19 N. Y. 523: *The riparian owner may undoubtedly use, for any purpose, the water of a navigable stream passing or adjoining his land, for his own advantage, so long as he does not impede the navigation, in the absence of any counter claim by the State or United States as absolute proprietor.* The conclusion follows that, as between these parties, the plaintiffs have a right to the natural flow of the water past their land, and any interference with this flow, to their injury, is a wrong for which they are entitled to an appropriate remedy. To prevent such a wrong, injunction is an appropiate remedy."

Morrill vs St. Anthony Falls Water Power Co., 26 Minn. 222.

It will be noticed that in the last case, the Supreme Court expressly refrains from deciding (1) to what extent the control of the State extends, (2) and also refrains from deciding, whether by virtue of any power which the State may have, it may deprive the riparian owner of its use of power without compensation. On all these points the decision is unsettled, and shows an evident unwillingness to define or limit its position on either of these two questions, for the reason partly, as stated by the court, that the adjudicated cases at that time do not seem to the court to have definitely covered the question.

The court in that case says:

"The riparian owner may undoubtedly use, for any purpose, the waters of a navigable stream passing or adjoining his land, for his own advantage, so long as he does not impede the navigation, in the absence of any counterclaim by the State or of the United States *as absolute proprietor.*"

In order to show the utter insignificance of this statement, as against the present position of plaintiffs in error, we wish right here to show that the same court afterwards decided that the State could not have and did not have any rights whatever as absolute proprietor. This was decided in 1892, in the case of *Bradshaw vs Duluth Imperial Mill Company*, in which the Supreme Court Said:

"It has been decided over and over again by this court that the right of the riparian owner to improve, reclaim and occupy the submerged land in front of his shore estate to the point of navigability is a vested property right, which cannot be taken away, even by the State for a public use, without compensation. Brisbine vs St. Paul & Sioux City R. R. Co., 23 Minn. 114; Union Depot, etc., Co. vs Brunswick, 31 Minn. 297 (17 N. W. Rep. 626); Hanford vs St. Paul & Duluth R. R. Co., supra. The old common law doctrine, or at least what has been generally assumed to be such, and which was adopted in some of the early American colonies, that the crown has a *jus privatum*, or right of private property, in navigable waters and their shores, which it could alienate to a subject, has no place in the jurisprudence of this State. It is the settled law with us that the rights of the State in navigable waters and their beds are sovereign, *and not proprietary*, and are held in *trust for the public as a highway*, and are incapable of alienation. Union Depot, etc., Co. vs Brunswick, supra; Hanford vs St. Paul & Duluth R. R. Co., supra."

Bradshaw vs Duluth Imperial Mill Co., 52 Minnesota 59.
Cited and approved in Gilbert vs Emerson, 55 Minn. 259.

Now continuing with the course of Minnesota decisions, we next cite the case of *State vs Minneapolis Mill Company*,

decided in 1879. In that case the tax assessor had computed the number of mill powers which were created by the water of the Mississippi and the dams of this plaintiff in error, the Minneapolis Mill Company, and had assessed them as so many mill powers under the head of "personal property." The tax was opposed by the Minneapolis Mill Company, on the ground that those mill powers arose from the riparian rights of the Mill Company as owner of the riparian lands, and were therefore part and parcel of the riparian land which would go to enhance the value of the land itself, but which could not be taxed as separate property. This proposition was sustained by the Minnesota Supreme Court, and the court in the decision said:

"In the recently decided case of Morrill vs St. Anthony Falls Water Power Co., ante, p. 222, we had occasion to consider the question of the rights of riparian proprietors upon the Mississippi River. The general rule arrived at was that a riparian owner may use the waters of a navigable stream adjoining his land, for any purpose, for his own advantage, so long as he does not impede navigation, and in the absence of any counter claim by the state or the United States. As the riparian owner has this right to the use of the water, he has a right to enjoy it and make it available; otherwise, his right would be a worthless abstraction. *He may, therefore, subject to the limitations of the general rule before stated, use the bed of the stream, if necessary or convenient to the enjoyment of his right to the use of the water. He may erect dams there, and such other structures as will promote and facilitate the enjoyment of this right. For these purposes the riparian proprietor may properly be said to have, if not an interest, certainly a right, in the bed of the stream, itself.* The right of a riparian proprietor upon a navigable stream, such as the Mississippi, rests as is held by this court in the case above cited, upon the fact of riparian ownership; that is to say, the riparian proprietor possesses this right because he owns the land upon the bank, and this is equivalent to saying that the right is attached as an incident to the riparian land, and belongs and appertains to the

same. Whether the right of the riparian proprietor to the use of the water can be severed from the ownership of the land, so that the right is owned by one person and the bank by another, and, if this could be and was done, what would be the character of the property of the owner of the right, as real or personal, are questions not raised by the facts of this case. The defendant is the owner of the bank, and of the right to the use of the water, and, therefore, of the right to make his right to the use of the water available by using the bed of the stream. In the defendant's hands the riparian land, and the right to the use of the water, and to the use of the bed of the stream, are held together. The principal, which is the riparian land, draws to it the incident, which is the right to the use of the water, so that the latter is part and parcel of the former. The defendant's right, as riparian proprietor, to the use of the water is not conferred by the provision before quoted from its charter. The effect of this section is to define the corporate powers of the company, and to signify the assent of the government to the use of the river, in the manner and for the purposes in said section mentioned.

"It follows from what we have said that the defendant's right to the use of the water is, for all purposes of taxation, real property and not personal, for our tax law provides that "real property, for the purposes of taxation, shall be construed to include the land itself, * * * and all rights and privileges belonging or anywise appertaining thereto." The leased water-powers which are sought to be taxed as personal property in this case, are merely a part of the defendant's right to the use of the water. They are, therefore, real and not personal property, and hence it follows that, in our opinion, they were improperly taxed as personal property."

State vs Minneapolis Mill Company, 26 Minn. 229.

At this place we will also call attention to the fact that the rights of the plaintiff in error, the St. Anthony Falls Water Power Company were again recognized, in a later decision, which does not attempt to define the extent of the sovereign power or control of the State.

St. A. F. W. P. Co. vs City of Minneapolis, 41 Minn 270.

Again in 1883, in the case of *Union Depot Co. vs Bruns-*

wick, the Supreme Court of Minnesota said, quoting first from the syllabus:

(Syllabus). "It is the settled law of this state that a riparian owner upon a navigable stream has the fee to low-water mark. But in addition to this, he has, as incident to his ownership, certain riparian rights, among which are the right to enjoy free communication between his abutting premises and the navigable channel of the stream, to build and maintain suitable piers, landings, or wharves on and in front of his land, and to extend the same therefrom into the stream to the point of navigability even beyond the low-water mark, and to this extent exclusively to occupy, for such and like purposes, the bed of the stream, *subordinate only to the paramount public right of navigation. These riparian rights are property, and cannot be taken away by the state without paying just compensation therefor.*"

(Decision). "At common law, the king as representative of the nation, held in trust for them all navigable waters, and the title to the soil under them. This was a sovereign or prerogative, and not a proprietary right. At the revolution the people of each state became sovereign, and in that capacity held all these navigable waters and the soil under them for their common use, subject only to the rights since surrendered to the general government. Martin vs Waddell, 16 Pet., 367; Mumford vs Wardell, 6 Wall., 436. New states, since admitted, have the same rights in these navigable waters as the original states. Upon the admission of a new state, this right of eminent domain in them, which was temporarily held by the United States, passes to the state. The patent from the United States of land on a navigable stream conveys to the patentee no title to the bed of the stream. This vests in the state as a sovereign right. Pollard vs Hogan, 3 How., 212, 222; Mumford vs Wardell, supra.

"In some states it is held (following the analogy of the common law rule applicable to waters where the tide ebbs and flows) that a riparian owner on a navigable stream has the fee only to ordinary high water. Such seems to be the tenor of the decisions of the federal courts. But, as it is wholly a matter for the state to determine the extent of its own rights, they follow on this question the decisions of the state courts.

"In this state it is the settled doctrine that the riparian owner has the fee to low water mark. Schurmeier vs St. Paul & Pac. R. Co. 10 Minn. 59 (82); Brisbine vs St. Paul & Sioux City R. Co. 23 Minn. 114. But while he only has the fee to low water mark, he has certain riparian rights incident to the ownership of real estate bordering upon a navigable stream. Among these are the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain suitable landings, piers, and wharves, on and in front of his land, and to extend the same therefrom into the river to the point of navigability, even beyond low water mark, and, to this extent exclusively to occupy for such and like purposes the bed of the stream, *subordinate only to the paramount public right of navigation.* Dutton vs Strong, 1 Black 22; Railroad Co. vs Schurmeier, 7 Wall. 272; Yates vs Milwaukee, 10 Wall. 497, supra; Rippe vs Chicago D. & M. R. Co., 23 Minn. 18; Brisbine vs St. Paul & Sioux R. Co., supra. *These riparian rights are property, and cannot be taken away without paying just compensation therefor. The state could not do it or authorize any one else to do it.* Yates vs Milwaukee, supra; Lyon vs Fishmongers' Co., L. R. 1 App. Cas. 662; Brisbine vs St. Paul & Sioux City R. Co., supra;

Union Depot Co. vs Brunswick, 31 Minn 297.

The above is the first case in which there is any attempted definition of the extent to which the control of the State extends. It is here clearly held that the power of the State is not a proprietary one, but only a sovereign one for the purpose of control for the uses of navigation. It is also held that whatever riparian rights the riparian owner has, they are "subordinate only to the paramount public right of navigation."

In that case the riparian rights mostly discussed were other than the use of the water for power; but in a later case, which we next quote from, the entire question was gone over fully and completely; and not only were the property rights of riparian owners to the use of the stream definitely stated, as we claim them for the plaintiffs in error in these cases; but the extent of the power of the State as against those rights was definitely

stated and decided, by repeated statements, to be a sovereign power of control only for the purpose of navigation. The case had been once decided by the Supreme Court with a different result on some points; and upon the re-argument, a further decision was given, overruling the first decision; and it is from this last decision which we quote. It is the case of *Hauford vs St. Paul & Duluth R'y Co.*, and was decided by the Supreme Court in 1890. The Supreme Court of Minnesota said:

"As we proceed now to notice the nature and extent of certain rights growing out of riparian proprietorship, we desire that attention should be given to the fact that those rights partake largely of the ordinary qualities of *private property*, which is in general divisible and transferable by the proprietor; that they are recognized as valuable property rights in the law; that they are of such a nature that they may be enjoyed separate from the adjacent land to which they were originally appurtenant; and to the absence of substantial reasons, so far as the nature of these rights are concerned, why they may not exist independently of the adjacent riparian estate. We do not affirm that all riparian rights are thus severable. Some from the very nature of things, may be incapable of separate existence."

"In this state the title of the proprietor of lands abutting upon navigable waters extends to low-water mark; the bed of the stream or body of water, below low-water mark, being held by the state, not in the sense of ordinary absolute proprietorship, *but in its sovereign government capacity, for common public use.* Union Depot, etc., Co. vs. Brunswick, 31 Minn. 297, (17 N. W. Rep. 626) and cases cited. THE ESTATE OR INTEREST OF THE RIPARIAN OWNER IN THE BED OF THE STREAM ABOVE LOW-WATER MARK IS **subject to the right of the public to use the same for the purposes of navigation; but restricted only by that paramount public right,** THE RIPARIAN OWNER ENJOYS VALUABLE PROPRIETARY PRIVILEGES, AMONG WHICH WE SHALL CONSIDER PARTICULARLY THE RIGHT TO THE USE OF THE LAND ITSELF FOR PRIVATE PURPOSES. A considerable extent of the shores, not only along tide-waters of the ocean coasts, but on our great inland waters, are of such a nature, out to and even beyond low-water mark, as

to be in general unavailable by the public for the purposes of navigation, and must remain forever waste and useless lands, unless reclaimed by artificial means from the shallow water covering them, or unless otherwise improved. It is established beyond question in this state, and in other states as well, that the proprietor of the riparian lands may make such improvements. *Subject only to the limitation that he shall not interfere with the public right of navigation, he has the unquestionable and exclusive right to construct and maintain suitable landings, piers and wharves into the water and up to the point of navigability for his own private use and benefit.* Rippe vs. Chicago, D. & M. R. Co. 23 Minn. 18; Brisbine vs. St. Paul & Sioux City R. Co. Id. 14; Morrill vs. St. Anthony Falls Water-Power Co., 26 Minn. 222, (2 N. W. Rep. 842); State vs Minneapolis Mill Co., 26 Minn. 229 (2 N. W. Rep) 839; Carli vs. Stillwater Street Ry. Co. 28 Minn. 373 (10 N. W. Rep. 205); Union Depot, etc., Co. vs. Brunswick, 31 Minn. 297, (17 N. W. Rep. 626); Lake Superior Land Co. vs. Emerson, 38 Minn. 406, (38 N. W. Rep. 200); Dutton vs. Strong, 1 Black 23; Yates vs. Milwaukee, 10 Wall. 497. And it is obviously immaterial, if the public interests be not prejudiced, whether the submerged land be covered with wharves of timber or stone, or be reclaimed from the water by filling in with earth, so that it becomes dry land. The land may be so reclaimed. Union Depot etc., Co. vs. Brunswick, 31 Minn. 297 (17 N. W. Rep. 626); Clement vs. Burns, 43 N. H. 609; Bell vs Gough, 23 N. J. Law, 624; Providence Steam Engine Co. vs. Providence & S. Steamship Co, 12 R. I. 348, 363. *As the right of private use and enjoyment of the improved or reclaimed premises will contine so long, at least, as it does not interfere with the limited and defined public interests, it is obvious that in general, it may continue forever.*

"*This private right of use and enjoyment is not, we think, limited to purposes connected with the actual use of the navigable water, but may extend to any purpose not inconsistent with the public right.* Rippe vs Chicago, D. & M. R. Co. 23 Minn. 18; Brisbine vs St. Paul & Sioux City R. Co., Id. 114; Parker vs West Coast Packing Co., 17 Or. 510 (21 Pac. Rep. 822). As was said in Morrill vs St. Anthony Falls Water Power Co., 26 Minn. 222, 228, (2 N. W. Rep. 842), referring to the decision in Dutton vs Strong, 1 Black, 23: "The right to encroach upon the shallow water of a lake, by an exclusive ap-

propriation, even of the underlying soil, must rest upon the proposition that the riparian owner may make any use of the lake or river opposite his land not inconsistent with the public right." The following language of the Morrill case, just cited, although used with reference to the riparian right to use the water of a navigable stream, is applicable here: "The limit to the private right is imposed by the public right, and the private right exists up to the point beyond which it would be inconsistent with the public right." No one but the riparian proprietor has the right to improve and occupy such premises for private purposes, and it does not concern other persons how or for what particular purposes the reclaimed lands may be used, so long as there is no violation of the maxim, *sic utere tuo ut alienum non laedas*. It is for the interest of the state that such lands, not available for *the public purposes for which alone the State exercises authority over them*, shall be improved and used for profitable enterprises, rather than that they lie forever waste and unproductive. And the state, while recognizing the ancient riparian right of occupancy, has not assumed to prescribe or to limit the purposes or manner of its enjoyment. That seems to have always been left to the discretion of the person in whom the right is exclusive, and the decided cases afford many illustrations of uses in no way connected with the purposes of navigation.

"*This right of the riparian proprietor, even before it has been in any manner exercised by reclaiming or improving the premises, the right itself to reclaim, improve, or occupy, is a property right, vested in him, recognized and protected in the law as property. He cannot be deprived of it without due process of law. It cannot be taken from him, and devoted to public use, without compensation.* Brisbine vs St. Paul & Sioux City R. Co., 23 Minn. 114; Carli vs Stillwater Street Ry. Co., 28 Minn. 373 (10 N. W. Rep. 205); Union Depot, etc. Co. vs Brunswick, 31 Minn. 297 (17 N. W. Rep. 626); Yates vs Milwaukee, 10 Wall. 497; Bell vs Gough, 23 N. J. Law. 624; Delaplaine vs Chicago & N. W. Ry. Co., 42 Wis. 214; Lyon vs Fishmongers' Co., L. R., 1 App. 662. Such property is subject to the law of eminent domain. A railroad company, locating its line of road over such submerged lands, might acquire, by condemnation proceedings and the payment of compensation, the necessary right of way, divesting the riparian owner of so much of his property. But cannot the riparian proprietor voluntarily

convey, for an agreed compensation, what the company could thus take from him by legal proceedings *in invitum?* If he were to convey by deed the right to occupy exclusively for railroad purposes the premises in front of the riparian lands, would not the company acquire a right to occupy and enjoy the use of the premises, although it took no interest in the upland estate?

"*These peculiar property rights of the riparian owner may constitute, estimated in connection with the riparian land, the chief value of the premises.* It may even be that the whole value of such real property consists in the right to improve and occupy the submerged lands for private purposes. The extent of the riparian right in this respect is not measured by the value of the upland, nor by the distance to which the owners' estate may extend inland from the shore. The barest strip of upland, though wholly valueless and useless in itself, justifies the owner in the exercise and enjoyment of the privileges of riparian proprietorship to the fullest extent."

* * * * * * *

"WE HAVE THUS CONSIDERED THAT THE RIPARIAN PROPRIETOR HAS THE EXCLUSIVE RIGHT—**absolute as respects every one but the state, and limited only by the public interests of the state for purposes connected with navigation**—TO IMPROVE, RECLAIM, AND OCCUPY THE SUBMERGED LAND, OUT TO THE POINT OF NAVIGABILITY, FOR ANY PRIVATE PURPOSE AS HE MIGHT DO IF IT WERE HIS SEPARATE ESTATE; **that this right, even though it may never have been exercised, is recognized and protected by the law as property, of which he cannot be deprived even by the state without just compensation.**"

Hanford et al. vs St. Paul & Duluth R. R. Co., 43 Minnesota 104.

This case was cited with approval in the case of *Gilbert vs Eldridge, 47 Minn. 210;* again in the case of *Minneapolis Trust Co. vs Eastman 47 Minn. 301*; again in the case of *City of Duluth vs St. Paul & Duluth Ry. Co., 49 Minn. 201;* and in the case of *Bradshaw vs Duluth Imperial Mill Co.*, already quoted from above, which was decided in 1892, and is reported in *52 Minn. 59.*

Lest the contrary should be claimed, we wish to show further that it is the law of the State of Minnesota, that any damage to or deprivation of property, of the nature complained of by the plaintiffs in error, constitutes a "taking" of property for public use.

In the case of *Weaver vs Boom Co.*, the Minnesota Supreme Court says:

"What constitutes a taking of private property within the meaning of the constitution? We are aware that there are numerous cases in which the doctrine has been successfully invoked that for a consequential injury to private property arising from the prosecution of public improvements for the public good—notably the grading of streets—there is no redress. The principle, if properly applied, is a sound one. But many decisions have, in our opinion, gone to the uttermost limit of sound judicial construction in favor of this principle, and in some cases beyond it; as, for example, a few which hold that nothing constitutes a taking which does not amount to an actual assumption of the possession. But, as has been well said by the supreme court of the United States (*Pumpelly vs Green Bay Co., 13 Wall. 166, 177*), 'it would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not taken for a public use.' Such a construction would be a perversion of the constitutional provision into an authority of the government for the invasion of private property, instead of a protection to the citizen. But there are abundant authorities to sustain the doctrine that a serious interruption to the common and necessary use of the property may be equivalent to the taking of it, and that under the constitutional provisions referred to, it is not necessary that the

property should be absolutely taken, and the possession directly assumed. Angell, in his work on watercourses, (section 465a) substantially states this as the law.

"It has been again and again decided to be the doctrine that overflowing land by backing water on it from dams built below constitutes a taking, within the meaning of the constitution, and that when real estate is actually invaded by superinduced additions of water, earth, sand or other material, so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the constitution. * *

"The evidence in this case tends to show that the effect of building this boom was to cause the logs to collect in it, and thereby raise the water in the river, and to turn it over and upon the lands of the plaintiff, and carry with it in high water large quantities of logs and drift, which, when the water subsided, were left stranded upon these lands, so as to effectually destroy or impair their usefulness. The evidence, on this point, we think, fully sustains the fourth special finding of the jury. These acts, if allowed to continue, would constitute a taking of the property, and not a mere consequential injury, and, defendant not having acquired the right to thus take or appropriate the property by payment of compensation in the manner provided by its charter, the plaintiff could maintain an action for his damages."

Weaver vs Miss. and Rum River Boom Co. 28 Minn. 534.

The same court also says in the same decision:

"The State itself cannot take private property for a public use without making compensation therefor, and consequently cannot grant such power to any one else. IT CANNOT DO SO UNDER THE PLEA OF IMPROVING THE NAVIGATION OF A PUBLIC RIVER ANY MORE THAN ANY OTHER PUBLIC PURPOSE. Riparian owners upon a public water course did not acquire and do not hold their property burdened by any such reservation or implied right on the part of the state. Undoubtedly, like every other person, they hold their property subject to the right of the state to take it by paying for it whenever it becomes necessary for a public purpose; and it must rest in the wisdom of the legislature to determine when such necessity exists. The improvement of the navigation of a public river is a public purpose. The floating or rafting of logs upon a public stream is a legitimate use of it as a highway, and the taking of prop-

erty bordering upon the Mississippi river for boom purposes, in order to improve and utilize the river for that purpose, may be a taking for public use. This court so held in *Cotton vs Miss. & Rum River Boom Co., 22 Minn. 372.*"

Weaver vs Miss. & Rum River Boom Co., 28 Minn. 534.

Again:

"To maintain a boom, which, in the usual course of things, will have this effect (to work damage to plaintiff's land) once or twice in the course of seven or eight years, is just as much a taking or appropriation of plaintiff's property as it would be if the like occurred every year, or every two years, or during those months of each year when the boom is in use. The taking may not have the same extent or duration, it may not exclude the plaintiff from his property for so much of the time, and consequently it may not impair his rights or damage him in the same degree as if it were permanent and constant; but as far as it goes it is nevertheless a taking."

McKenzie vs Boom Co., 29 Minn. 293.

"Making one's premises a place of deposit for the surplus water in the sewers in times of high water, or creating a nuisance upon them so as to deprive the owner of the beneficial use of his property, is an appropriation requiring compensation to be made."

Tate vs St. Paul, 56 Minn. 527.

See also In Re Minnetonka Lake Improvement, 56 Minn., 513.

We here again call attention to the fact indisputably shown by the record, that at these falls the river is not navigable in fact, and there is no "point of navigability" (transcript, pp 26 and 28); and, without citing further from Minnesota decisions, we make the deduction and statement from these decisions already quoted from as follows:

By the decisions of the Supreme Court of the State of Minnesota, plaintiffs in error have a right as riparian owners to build and maintain their dams to the center of the stream, and to use for power all the water naturally flowing

past their lands and over their dams so constructed. This right is a vested private property right. If it is subject to any right at all of the State, the only right of the State to which it is subject or subordinate in any way, is, as stated in the *Union Depot* case and the *Hanford* case, expressly defined and limited to be the right of the State to control the use of the bed and waters of the stream, for the purposes of navigation; that even if the State should exert whatever paramount right it has, it can only exert that right to the damage of plaintiffs by making compensation. It certainly cannot take away or diminish the use of the power created by their dams and the entire natural flow of the river, for a purpose inconsistent with the purposes of navigation, without providing for and making just compensation for such injuries.

There is not a single decision in the State of Minnesota, except the decision in the cases at bar, which even indirectly points to an intention on the part of the State to recognize a different rule from that which is thus the inevitable conclusion from the decisions which we have quoted.

If, then, the extent of the property rights of plaintiffs in error are to be fixed by the decisions of the State courts, it has been so fixed to the full extent as claimed here for the plaintiffs in error.

It may be claimed by the defendent that because of the general statement of this court in *Hardin vs Jordan*, *140 U. S. 371*, that "it depends upon the laws of each State to what extent the prerogative of the State to lands under water shall extend, upon a navigable stream," there is reserved an absolute and arbitrary right in the State to fix and change those laws at will, and that, as the State Supreme Court has said in this decision in question that the riparian rights of plaintiffs in error

were subject to be taken away by the State for other purposes than navigation without making compensation, such decision settled the question here to be determined in this court. But such was not the intent nor the construction which this court has placed upon the statement quoted from the case of *Hardin vs Jordan, 140 U. S. 371.* The rule which this court established in reference to that matter is this:

That where the state has not asserted any right or attempted to restrict the right, the rights of the riparian owners upon navigable streams, are to be governed by the general laws of the land, including the common law, so far as applicable; and that the rule of property which the state will be said to have established with reference to those rights, will be gathered, if it can be gathered, from the general trend of decisions of the state court up to the time of the decision in question.

Kaukauna Co. vs Green Bay Co., 142 U. S. 254.
Fallbrook Irrigation District vs Bradley, 164 U. S. 168.

Where there is an exceptional decision, apparently against ordinary rules as laid down in the general current of decisions of the State court, by which a different rule might be gathered that decision will be rejected by this court and the general trend of decisions will be followed.

Hardin vs Jordan, 140 U. S. 371.

In view of the unqualified and clearly established rule of property laid down as above shown by the decisions of the Minnesota Supreme Court, to say that the decision of that court in the cases now being considered is to be the one from which the rule of property is to be adduced, would be to establish a rule which might be the instrument of the greatest abuse to property rights by State courts. An established property right, which

by every reasonable rule could not have been taken away from the holder without compensation, could be taken away by decision of the state court holding, simply, that, whatever the property right was or had been, it was a property right "subordinate" or "subject" to some power in the state now asserted for the first time. By such means the jurisdiction of this court, which has been conferred upon it, for the purpose of preventing arbitrary deprivations of private property by the states, would be to a very large extent taken away. Any State court could from time to time declare a species of property, which would otherwise and in all jurisdictions be understood to be absolute, as being subject to burdens which were contrary to well established principles of law governing property rights. On the faith of rules of property clearly established by State courts and all the courts of the land, holders of private property might go on for years investing and improving by permanent and expensive structures; and then by a mere declaration, unsupported and without any pretense of support from adjudicated cases, the rules of property upon the strength of which those investments and improvements had been made could be changed and property rights be taken away, without the remedy which the federal Constitution intended should be had. These questions, then, in so far as they are to be decided by the decisions of the State courts, are to be decided solely upon those decisions as they existed before the rendering of the decision complained of, and on account of which the writ of error has been issued from this court.

5.

The Statute of 1885, as construed by the Supreme Court of Minnesota, has the effect, not only to deprive Plaintiffs of their private property for a public use, without compensation, but also to deprive them of that property, for a private use, without compensation.

The record shows:

The faucets and outlet pipes through which this water is taken are in manufacturing buildings and in business buildings of all kinds in the City of St. Paul.

Page 49 Transcript.

"In St. Paul there are a large number of public buildings * * boot and shoe manufactories, buildings that are run by steam boilers, and other manufacturing buildings that are run by steam. We supply water for some of these buildings, and for some of the manufacturing buildings. They had a right to use it to fill their steam boilers and for rental purposes. The water department gives them the right in these buildings and other buildings to use it for boilers, and steam. And there are other manufactories that the water department gives the same right to, for filling steam boilers which are used for the purpose of running engines for power, all of which are owned by private individuals. We have three meters in the city in churches that are used for running organs. * * Our consumers can use the water for any purpose they want to. Any customer who will take the water and pay for it, we allow to use it in filling boilers for manufactories. * * We

supply water to private fountains for ornamental use in two or three instances, outside of the land sprinklers, and we supply it for the public parks and get rent for it at certain fixed charges collected by the board."

Page 50–51 Transcript.

"The water which is measuredby meters amounts to one million gallons a day. We measure the water in all the large establishments, and in all the manufacturing establishments by meters."

Page 51 Transcript.

"The water from Lake Phalan supplies a large number of these mechanical purposes, but some of the water that comes from Lake Vadnais supplies some too."

Page 51 Transcript.

"Lake Vadnais is the lake into which water that is pumped from Lake Baldwin by our station comes. * * All of the high service is supplied from Lake Vadnais and some of the low service is supplied from Lake Phalan."

Page 49 Transcript.

Plaintiffs claimed in the courts below and still claim, that the character of these uses as thus defined, is in no sense of the word a "public" use, to which the rights of plaintiffs can possibly be made subordinate. Plaintiffs use the water for power, but they have a right to it by reason of their natural situation. To hold that, whether through the instrumentality of the State, or in any other way, that water which naturally flows past their land, and which they need for power, can be taken away from them and transported away from the river for a distance of from ten to fifteen miles, and then sold to other individuals for the use of manufacturing and the running of motors, is to allow a taking of property for "private" use. Those are not

such "public" uses, as can possibly be paramount to the rights of plaintiffs.

It has been held that the public water supply company, cannot even by condemnation acquire a right to divert water of a stream for the purposes of such private uses, even by paying compensation.

In re Barre Water Co., 62 Vermont 27.

The State court was, then, wrong when it says in these cases, that all of the uses shown by the record are proper "public" uses, and especially when it holds, that all of those use are paramount to any rights which plaintiffs have. That holding of the Minnesota Supreme Court, is not binding upon this court. In a case of this kind, this court, in the hearing upon writ of error, will decide as to what are proper "public" and "private" uses. As was said in the case of *Fallbrook Irrigation District vs Bradley:*

"We do not assume that these various statements, constitutional and legislative, together with the decisions of the State court, are conclusive or binding upon this court, upon the question as to what is due process of law, and as incident thereto what is public use. As here presented these are questions which also arise under the Federal Constitution, and we must decide them in accordance with our view of the constitutional law."

Fallbrook Irrigation District vs Bradley, 164 U. S. 168.

6.

In view of what has already been shown, the statute of 1885, having the effect, as construed and declared valid by the State Supreme Court of Minnesota, to take away from plaintiffs and to diminish their private property rights, without any provision for compensation, it therefore has the effect to deprive plaintiffs of their private property without due process of law; and this Court upon these writs of error will review the questions involved, and will reverse the judgment of the State Court.

We have shown that the plaintiffs in error have property right to the use for power of all the water naturally flowing over their dams, which is not subject or subordinate to any paramount right of the State to divert for the purposes of defendant in error, without making compensation.

This property right is one belonging to the plaintiffs in error by the rules of property, beyond the power or jurisdiction of the Courts of Minnesota to disregard, which have been established and settled in each of the following ways:

1. By the law of the land govering those rights as it has always existed, before, at the time, and ever since, the plaintiffs in error became riparian owners upon the river; and by a rule of property which is so general and well established that, even if the Minnesota court had ever attempted to refuse it recognition, such refusal could not affect the rights of the plaintiffs in error; but it is one which the Minnesota courts have never before denied.

Divisions 1, 2 and 3, Part II of this Brief.

2. By a rule of property which if, it were to be established alone by the decisions of the Minnesota court, has been clearly and indisputably fixed by these decisions as claimed by the plaintiffs in error.

Division 4, Part II above.

That private property should, in no case, be taken or damaged for a public use except in duly authorized proceedings and by making just compensation, is a protection to property which has been guaranteed by every fundamental law of Minnesota and of the territory from which it was formed, as shown by the provisions of those fundamental laws from the earliest to the present times. This is shown by the following:

1. By the ordinance of 1787.

No. 1 Appendix hereto.

2. By the Organic Act of Minnesota and the act authorizing a State government.

Nos. 3 and 4 Appendix hereto.

3. By the Constitution of the State of Minnesota which provides:

"No person shall * * be deprived of life, liberty or property without due process of law."

Sec. 7, Article I, Constitution of Minnesota.

See No. 4 Appendix hereto.

"Private property shall not be taken for public use without just compensation therefor first paid or secured."

Sec. 13, Article I, Constitution of Minnesota.

See No. 4 Appendix hereto.

Under these circumstances, the diversion made by defendant under the authority of the act of 1885 deprives plaintiffs in error of their property, without due process of law; and that statute is therefore repugnant to 14th Article of the Amendments to the Federal Constitution.

Kaukauna Co. vs Green Bay Co., 142 U. S. 254.
Yessler vs Washington Harbor Line Coms., 146 U. S. 654.
Fallbrook Irrigation District vs Bradley, 164 U. S. 168.
Hardin vs Jordan, 140 U. S. 371.

Under our assignments of error the next point which we make, is that the statute of 1885 has the effect to impair the obligation of contracts.

III.

EVEN IF IT SHOULD BE HELD, THAT THE PLAINTIFFS IN ERROR HAVE A PROPERTY RIGHT IN THE USE OF ALL THE WATER FOR POWER NATURALLY FLOWING PAST THEIR LANDS, WHICH, SO FAR AS THEIR RIGHTS AS RIPARIAN OWNERS ARE CONCERNED, IS SUBJECT TO BE DIVERTED BY THE STATE FOR THE PURPOSES OF DEFENDANT, WITHOUT COMPENSATION, STILL PLAINTIFFS HAVE, BY VIRTUE OF THEIR CHARTERS, A CONTRACT PROPERTY RIGHT TO THE USE OF ALL THE POWER CREATED BY THEIR DAMS AND BY THE NATURAL FLOW OF THE MISSISSIPPI PAST THEIR LANDS, WHICH IS NOT SUBJECT TO ANY RIGHT OF THE STATE TO DIVERT WITHOUT COMPENSATION; AND THE STATUTE OF 1885, AS CONSTRUED BY THE MINNESOTA SUPREME COURT, HAS THE EFFECT TO DEPRIVE THE PLAINTIFFS OF THAT CONTRACT RIGHT, AND IS THEREFORE REPUGNANT TO SECTION 10 OF ARTICLE I OF THE FEDERAL CONSTITUTION IN THAT IT IMPAIRS THE OBLIGATION OF CONTRACTS.

The charter of the plaintiff in error, theSt. Anthony Falls Water Power Company, passed in 1856 provides as follows:

"SEC. 9. The said corporators are hereby authorized for the purpose of the improvement of the water power above and below the Falls of St. Anthony, in the Mississippi River, to maintain the present dams and sluices, and construct and maintain dams, canals, and water sluices, erect mills, buildings, or other structures for the purpose of manufacturing in any of its branches, or improving any water power owned or possessed by said Company in such manner, or to such extent as shall be

authorized by the Directors of said Company, and may construct dams on the rapids above or below the Falls of St. Anthony, with side dams, sluices, and all other improvements in the Mississippi River, upon the property owned or to be owned by said corporators, which may be necessary for the full enjoyment of the powers herein granted; provided however, that said corporation shall give a free passage for all loose logs, that are to be manufactured on Hennepin or Cataract Islands, or between them on the Falls, through any dam or dams they may erect, on the West side of Nicollet or Hennepin Island, and a passage through the pond above said dam, shall when needed be twenty feet wide; provided that nothing herein contained shall be so construed as to authorize said corporation to interfere with the rights or property of any other person or persons whatever."

The charter of the plaintiff in error, the Minneapolis Mill Company, passed in 1856, provides as follows:

"SEC. 9. The said corporators are hereby authorized, for the purpose of the improvement of the water power above and below the Falls of St. Anthony in the Mississippi river, to maintain the present dams and sluices, and to construct dams and canals, and water sluices, erect mills, buildings, or other structures, for the purpose of manufacturing in any of its branches, or improving any water power owned or possessed by said Company in such manner to such extent as shall be authorized by the Directors of said Company, and may construct dams on the rapids above and below the Falls of St. Anthony, with side dams, sluices, and all other improvements in the Mississippi river, which may be necessary for the full enjoyment of the powers herein granted.

"SEC. 11. This act shall take effect and be in force from and after its passage, and may be amended by any subsequent Legislative Assembly, in any manner not destroying or impairing the vested rights of said corporators; provided, that nothing herein contained shall be so construed as to authorize said corporation to interfere with the rights or property of any other person or persons whatever.

"SEC. 12. Provided further, that nothing contained in the act entitled an act to incorporate the St. Anthony Falls Water Power Company shall be so construed as to allow the said St. Anthony Falls Water Power Company, to maintain or con-

struct dams or sluices extending beyond the center of the channel of the Mississippi river from the western bank of Hennepin Island, and said St. Anthony Falls Water Power Company are hereby restricted in the exercise of powers and privileges granted by the ninth section of said act to the space between the western bank of said island and the center of said river; provided the said dams shall always be provided with suitable slides and sluices, so as to admit the passage of logs and timber down the Mississippi river, and that any fnture Legislature may amend, or modify this act or the act to which this section is amendatory, and provided further that the Minneapolis Mill Company shall be restricted in its operations to the center of the main channel of the Mississippi river and to the property belonging to said Company."

Plaintiffs claim in the first place that the charter of the St. Anthony Falls Water Power Company, containing no provision whatever for amendments, or modification, was never subject to any modification or amendment whatever without the consent of that Company; and accordingly that the attempted provision for an amendment of that charter inserted in the charter of the Minneapolis Mill Company is invalid.

Smith vs S. A. T. & F. Co., 64 Feb. Rep. 272, and cases there cited.

Assuming that both charters were subject to amendment or modification, there has never been any amendment which in any way attempts to take away the privileges granted in those charters. They accordingly stand as grants of those privileges, without any attempt at revocation or amendment. The powers granted have been exercised and rights thereby have tested which no statute can take away or diminish.

Allen vs McKean, 1 Sumner, 276.
Miller vs Railway Co., 21 Barbour, 513.
Commonwealth vs Essex Co., 79 Mass. 239.

Although such construction of the provisions of those charters may have been made by the Supreme Court of the

State of Minnesota, that the act of 1885 does not invalidate their provisions, this Court is not bound by that construction. It will examine the question for itself and determine, under the general law of the land applicable to such grants, the force and effect of those provisions.

Bridge Proprietors vs Hoboken Co. 1 Wall. 116.

In construing a statute of a State, and a contract right under a State statute, the United States Court will adopt a settled construction existing when the contract in question was made, and reject a more recent decision of the court of the State as not conferring a rule for such a case.

Piqua State Bank of Iowa vs Knopp, 16 How., 369

The question, then, of the force and effect of those charters is one which must now be re-examined by this court, and will be decided in accordance with the law applicable to such grants as it existed at the time the grants were made.

Referring, first, to what has been said by the Supreme Court of the State of Minnesota as to the effect of those provisions of the charter, all that has been said by the Supreme Court as to those provisions, is contained in the decision in the case of *Morrill vs St. Anthony Falls Water Power Company*, and the case of the *State vs The Minneapolis Mill Company*, which are set out in Sub-division 4 of part I of this brief above.

The purport of these decisions is, that all the rights to the use of the water in the Mississippi river which are here claimed by plaintiffs, belong to them by virtue of their riparian ownership; and that *therefore* the charters do not give any special privilege or grant, but is only a statement of general authority included in the act of incorporation.

But in this part of our argument, which relates to the

obligation of contracts, we are assuming (for the purpose of argument only) that the plaintiffs did not get the rights which they claim by virtue of their position as riparian owners. This is eliminating the assumption and the very reason upon which these holdings of the State court as to the force of the provisions of these charters were made. Consequently the force of those decisions at this time, is nothing.

To get at the question which is here open to discussion, we must assume that the plaintiffs did not get the riparian rights they claim, by virtue of their riparian position, and that they did not have those rights by virtue of that position at the time these charters were passed, nor at the time immediately following when they entered upon the river and made the improvements which they have maintained ever since.

Under circumstances thus necessarily assumed, those provisions in the charters must have had a significant force and effect. They could not be held to be merely statements of general authority to do just the things that the riparian owners would have a right to do. They became and were special grants and privileges, which, when acted upon, were irrevocable by the state; and which gave to plaintiffs a special vested private property right in and to the use of the power which was created by all the water naturally flowing past their lands over the dams which they were authorized to construct. It should be noticed, too, that this very decision in question, holds that the plaintiffs, by their charters, were authorized to build and maintain dams in the Mississippi River at the Falls of St. Anthony about ten miles above St. Paul, for the development of water power and for the use and sale of such power.

See decision page 77, Transcript of Record and No. "9," Appendix hereto.

These territorial statutes, by the provisions of the Constitution of the State of Minnesota, and its admission as a State to the Union, became binding contracts upon the state of Minnesota.

The State Constitution provides:

"That no inconvenience may arise by reason of a change from the territorial to a permanent state government, it is declared that all the rights, actions, prosecutions, judgments, claims and contracts, as well of individuals as of bodies corporate, shall continue as if no change had taken place. * *

"All laws now in force in the Territory of Minnesota, not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or be altered or repealed by the Legislature."

See quotations from Minnesota Constitution No. "4" in Appendix hereto.

The record here shows that immediately upon the passage of these charters, the plaintiffs entered upon the construction and maintenance of the improvements, which were provided for in these charters, in order to make the power which they were authorized to develop and control available; and that from the year 1856 up to the present time, they have so remained in ownership and possession.

Transcript of Record, page 26.

This constituted the acceptance of the grants conferred by those charters, which have never been attempted to be revoked, amended, modified or repealed in any way by the State of Minnesota. More than that, when so acted upon and accepted, they became irrevocable whether the grants be construed as a mere license or as absolute grants.

When so acted upon they invested the plaintiffs with a property right, guaranteed to them by the force of their charters, which is in the nature of a contract. And none of those rights, privileges or property thus acquired and possessed, could be taken from them arbitrarily by the State. Any statute which so attempts to lessen or diminish the rights granted and acquired by the plaintiffs, is one which impairs the obligation of the contract rights guaranteed to plaintiffs by their charters.

Monongahela Nav. Co. vs U. S. 148, U. S. 312–324.
Bridge Proprietors vs Hoboken Co., 1 Wall. 116.

In conclusion, then, on this point, the plaintiffs did acquire and have held since 1856, a contract right to the full enjoyment and use of all the power created over their dams by the natural flow of water in the Mississippi river opposite their lands. The effect of the statute of 1885, as construed by the Minnesota Supreme Court, is to impair the obligation of that contract right. It is therefore repugnant to Secton 10 of Article 1, of the Federal Constitution.

IV.

CONCLUSION.

In conclusion, we maintain that it has been shown, that the Statute of 1885, as construed by the Minnesota Supreme Court, has the effect of depriving plaintiffs of their private property without due process of law; and that further it has the effect of impairing the contract obligation and right invested in plaintiffs by virtue of their charters.

In the argument in the Supreme Court of Minnesota, after protesting that to deny our claim was, not only to take away private property of plaintiffs without due process of law, by taking it without just compensation, but also to impair the obligation of contracts, in contravention of both the State Constitution and of the Constitution of the United States, we called attention in that court to the following considerations, which we repeat here:

Although there were many minor errors at the trial, the disposition made of these cases, leaves the one question first above discussed (that the diversion proposed is repugnant to the State and Federal Constitutions), as the central and most prominent one on this appeal. To sustain the decision of the lower court is, we believe, to institute a new and revolutionary doctrine in regard to property rights in this State; and this too, at the very time when the highest court in our land is warning the judiciary against "illegitimate and unconstitutional practices" which "get their first footing by silent approaches and slight devia-

tions from legal modes of procedure." (Monongahela case, *148 U. S. 321*, quoting Justice Bradley in the case of *Boyd vs U. S. 116 U. S. 616*). It might be an easy matter by just such steps as would be laid by the decision in the court below, stealthily to encroach upon the property rights of citizens on the pretext of defending the rights of the people at large; with the result that the security insured to every property owner and wage earner vanishes at the same time with the disapearance of those legal principles in regard to property rights which have heretofore prevailed, and which the constitutional provisions of the State and of the United States have been made to protect.

The fresh water rivers of America, and especially in this part of the United States, furnish a natural and very valuable means of power for the establishment of manufacturing towns and cities. Indeed, at these very Falls of St. Anthony, the water power has built up and maintained a populous and thriving community, and has established the greatest center of flour manufacturing in the world, all of which, in a country where fuel is scarce and expensive and where competition with manufacturing establishments situated near the eastern fuel supplies is exceedingly difficult, could never have been done without this water power. There is no one use, unless it be that of navigation, to which nature has intended these rivers to be put so much as that of obtaining water power. On the strength of these advantages offered by nature, and the recognized principles of riparian rights, expensive mill structures and improvements have been constructed and maintained for years, and money has been invested for the purpose of utilizing the most economical method for obtaining power. If ten million gallons a day can be pumped away in one instance to be sold

to private individuals, who live several miles away from the point of diversion, for purposes not only public, but private, without making compensation to the riparian owners, legally entitled to the use of the water in its natural channel,—there can be no limit fixed to the extent to which the diversion of natural streams shall be carried, to the damage of the rights of riparian owners.

We respectfully submit, that the contention of plaintiffs in error in these cases should be sustained, and that this court should reverse the judgments of the State court in these two cases.

ROME G. BROWN, and
Charles S. Gilbert, Attorneys for Plaintiffs in Error.

APPENDIX.

Containing quotations referred to in the within brief, from the following:

1. Ordinance of 1787.
2. Organic Act of Minnesota.
3. Act Authorizing State Government.
4. Constitution of Minnesota.
5. Act of Admission to Union.
6. Charter of St. Anthony Falls Water Power Co.
7. Charter of Minneapolis Mill Company.
8. Act of 1885, Charter of Defendant in Error.
9. Opinion and Syllabus of Supreme Court of Minnesota in Cases at Bar.

1.

AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO.

ARTICLE II.

No man shall be deprived of his liberty or property, but by judgment of his peers, or the law of the land, and should the public exigencies make it necessary for the common preservation to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, bona fide, and without fraud previously formed.

ARTICLE IV.

The said territory, and the states which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the federal debts, contracted or to be contracted, and a proportional part of the expenses of government to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures

of the district or districts, or new states, within the time agreed upon by the United States in Congress assembled. The legislatures of these districts, or new states, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, duty or impost therefor.

General Statutes Minnesota, 1894, p. XLVIII.

2.

ORGANIC ACT OF MINNESOTA.

SEC. 6. EXTENT OF THE LEGISLATIVE POWER.

And be it further enacted; That the legislative power of the territory extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws passed by the legislative assembly and governor shall be submitted to the congress of the United States, and, if disapproved, shall be null and of no effect.

SECTION. 12. INHABITANTS TO BE ENTITLED TO ALL THE RIGHTS OF INHABITANTS OF WISCONSIN—LAWS OF WISCOSIN TO CONTINUE IN FORCE.

And be it further enacted: That the inhabitants of the said territory shall be entitled to all the rights, privileges and immunities heretofore granted and secured to the territory of Wisconsin and to its inhabitants; and the laws in force in the territory of Wisconsin at the date of admission of the state of Wisconsin shall continue to be valid and operative therein, so far as the same shall not be incompatible with the provisions of this act, subject, nevertheless, to be altered, modified, or repealed by the governor and legislative assembly of the said territory of Minnesota; and the laws of the United States are hereby extended over and declared to be in force in said territory, so far as the same, or any provision thereof, may be applicable.

SEC. 20. HOW LAWS SHALL BE ENACTED BY THE ASSEMBLY AND APPROVED BY THE GOVERNOR.

And be it further enacted: That every bill which shall or may pass the council and house of representatives, shall, before it becomes a law, be presented to the governor of the territory; if he approve, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated; which shall cause the objections to be entered at large upon their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall also be reconsidered, and if approved by two-thirds of that house, it shall become a law; but in any such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered in the journal of each house respectively. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been pre-

sented to him, the same shall become a law in like manner as if he had signed it, unless the legislative assembly, by adjournment, prevent it; in which case it shall not become a law.

General Statutes Minnesota, 1894, p. LI.

3.

ACT AUTHORIZING A STATE GOVERNMENT.

SECTION 1. INHABITANTS OF PART OF MINNESTOA AUTHORIZED TO FORM A CONSTITUTION AND STATE GOVERNMENT.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, That the inhabitants be, and are they hereby authorized to form for themselves a constitution and state government, by the name of the state of Minnesota, and to come into the Union on an equal footing with the original states, according to the federal constitution.

SEC. 2. JURISDICTION OVER BORDERING WATERS WHICH ARE DECLARED TO BE COMMON HIGHWAYS.

And be it further enacted, That the state of Minnesota shall have concurrent jurisdiction on the Mississippi and all other rivers and waters bordering on the said state of Minnesota, so far as the same shall form a common boundary to said state, and said river or waters leading into the same shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor.

General Statutes Minnesota, 1894, p. LIX.

4.

CONSTITUTION OF THE STATE OF MINNESOTA.

ARTICLE I.

SEC. 2. No person of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.

SEC. 7. No person shall be * * deprived of life, liberty or property without due process of law.

SEC. 11. No bill of attainder, ex post facto law, or any law impairing the obligation of contracts shall ever be passed.

SECTION 13. PRIVATE PROPERTY SHALL NOT BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION THEREFOR, FIRST PAID OR RECEIVED. secured.

SEC. 16. FREEDOM OF RELIGIOUS BELIEF.

The enumeration of rights in this constitution shall not be construed to deny or impair others retained by and inherent in the people.

ARTICLE II.

SEC. 2. JURISDICTION ON RIVERS.

The State of Minnesota shall have concurrent jurisdiction on the Mississippi, and all other rivers and waters bordering on the said State of Minnesota, so far as the same shall form a common boundary to said State (and any other state or states now or hereafter to be formed by the same); and said rivers and waters (and navigable waters) leading into the same, shall be common highways, and forever free, as well to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost or toll therefor.

SEC. 3. ACCEPTANCE OF THE PROPOSITIONS CONTAINED IN THE ENABLING ACT.

The proposition contained in the act of congress entitled "An act to authorize the people of the territory of Minnesota to form a constitution and state government preparatory to their admission into the Union on an equal footing with the original states," are hereby accepted, ratified and confirmed, and shall remain irrevocable without the consent of the United States; and it is hereby ordered that this state shall never interfere with the primary disposal of the soil within the same, by the United States, or with any regulations congress may find necessary for securing the title to said soil to bona fide purchasers thereof; and no tax shall be imposed on lands belonging to the United States, and in no case shall non-resident proprietors be taxed any higher than residents.

ARTICLE X.

SEC. 4. LANDS TAKEN FOR PUBLIC WAY.

Lands may be taken for public way, for the purpose of granting to any corporation the franchise of way for public use. In all cases, however, a fair and equitable compensation shall be paid for such land, and the damage arising from the taking of the same; but all corporations being common carriers, enjoying the right of way in pursuance of the provisions of this section, shall be bound to carry the mineral, agricultural and other productions or manufactures on equal and reasonable terms.

ARTICLE XV.

SCHEDULE.

SEC. 1. RIGHTS UNDER TERRITORIAL LAWS SAVED.

That no inconvenience may arise by reason of a change from a territorial to a permanent state government, it is declared that all the rights, actions, prosecutions, judgments, claims

and contracts, as well of individuals as of bodies corporate, shall continue as if no change had taken place; and all process which may be issued under the authority of the territory of Minnesota previous to its admission into the Union of the United States, shall be as valid as if issued in the name of the State.

SEC. 2. TERRITORIAL LAWS CONTINUED.

All laws now in force in the territory of Minnesota not repugnant to this constitution, shall remain in force until they expire by their own limitations, or be altered or repealed by the legislature.

SEC. 4. STATE TO SUCCEED TO ALL RIGHTS OF TERRITORY.

All recognizances heretofore taken, or which may be taken before the change from a territorial to a permanent state government, shall remain valid, and shall pass to and be prosecuted in the name of the State; and all bonds executed to the governor of the territory, or to any other officer or court in his or their official capacity, shall pass to the governor or state authority, and their successors in office, for the uses therein respectively expressed, and may be sued for and recovered accordingly; and all the estate of property, real, personal or mixed, and all judgments, bonds, specialties, choses in action, and claims and debts of whatsoever description, of the territory of Minnesota, shall inure to and vest in the State of Minnesota, and may be sued for and recovered in the same manner and to the same extent by the State of Minnesota, as the same could have been by the territory of Minnesota. All criminal prosecutions and penal actions which may have arisen or which may arise before the change from a territorial to a state government, and which shall then be pending, shall be prosecuted to judgment and execution in the name of the State. All offences committed against the laws of the territory of Minnesota before the change from a territorial to a state government, and which shall not be prosecuted before such change, may be prosecuted

in the name and by the authority of the State of Minnesota, with like effect as though such change had not taken place, and all penalties incurred shall remain the same as if the constitution had not been adopted. All actions at law and suits in equity which may be pending in any of the courts of the territory of Minnesota at the time of a change from a territorial to a state government, may be continued and transferred to any court of the state which shall have jurisdiction of the jesubct-matter thereof.

General Statutes Minnesota, 1894, p. LXI.

5.

ACT OF ADMISSION INTO THE UNION.

SEC. 3. LAWS OF THE UNITED STATES EXTENDED OVER IT —MADE A JUDICIAL DISTRICT ETC.

And be it further enacted: That from and after the admission of the state of Minnesota, as hereinbefore provided, all the laws of the United States which are not locally inapplicable shall have the same force and effect within that state as in other states of the Union.

Page CXII, Minnesota General Statutes, 1894.

6.

CHARTER OF THE ST. ANTHOTY FALLS WATER POWER COMPANY.

AN ACT ENTITLED AN ACT TO INCORPORATE THE ST. ANTHONY FALLS WATER POWER COMPANY.

Be it enacted by the Legislative Assembly of the Territory of Minnesota:

SECTION 1. That Franklin Steele, Thomas E. Davis, John F. A. Sanford, Fred'k C. Gebhard, Richard Chute and John S. Prince, their associates, successors and assigns, are hereby created a body corporate, with perpetual succession under the name and style of the Saint Anthony Falls Water Power Company, and by that name and style, shall be, and are hereby made capable in law, to have, purchase, receive, possess, sell, convey, and enjoy, real and personal estate and retain to them their successors and assigns, all such real and personal estate, to sue and be sued, plead and be impleaded, answer and answered unto, defend and be defended in courts of record and elsewhere, and to do any and all acts that the members thereof might or could lawfully do as individuals, and shall have and enjoy all proper remedies at law and equity to secure and protect them in the exercise and use of the rights and privileges, and in the performance of the duties herein

granted and enjoined, and to prevent all invasion thereof, or interruption in exercising and performing the same, to make such by-laws as they may deem proper, and also to have, make and use a common seal, and to alter, renew or change the same at pleasure.

SEC. 2. The officers of said Company shall be a President, Treasurer, three Directors, and a Secretary, whose duties shall be prescribed by the by-laws of said Company; but the said Company may increase the number of Directors at any time by a majority vote of the stock of said Company.

SEC. 3. The term of office of each of the officers of said Company shall be one year, and until their successors in office shall be elected and qualified. That Franklin Steele shall call the first meeting of said corporators, by giving personal written notice to each of said corporators, designating therein the time and place of holding the same, at which time and place he shall call said meeting to order, and be President pro tempore thereof. The said meeting shall then proceed to ballot for President thereof, who when elected shall be President of said meeting, and also first President of said Company; after which the said meeting shall proceed to elect a Secretary of said Company, who shall be Secretary of said meeting and also the first Secretary of said Company; the said meeting shall then proceed to elect three Directors and a Treasurer of said Company, after which the said Company shall be deemed to be organized for the purpose of transacting business. The first officers of said Company shall be elected by a majority vote of the corporators present, and after said first meeting the elections of all officers of said Company, and all business requiring the votes of said Company, shall be made by a majority of the shares of the capital stock of the same, such stockholder having the right either in person or by proxy to cast as many votes as he may own shares of the capital stock therein.

SEC. 4. If an election of officers shall not be made on the day specified in the by-laws for that purpose, said corporation shall not for that cause be dissolved, but such election may be

made on any other day, in such manner as shall be prescribed by the by-laws of said corporation.

SEC. 5. When said Company is organized as aforesaid, at any annual or special meeting thereof, the said Company may by a vote of a majority of the stockholders, voting by shares as aforesaid, elect for a term of one or more years an agent or agents for the transaction of the business of said Company, who shall reside within this Territory, and have such power and authority to transact the business of said Company, as the said Company by vote as aforesaid, shall delegate and authorize; and no agent elected as aforesaid, shall enter upon the duties of his office, or transact any business in behalf of or for the said Company, until the President and Directors thereof, shall make and execute a power of attorney in due form, and acknowledge the same before an officer empowered to take acknowledgments of deeds within this Territory, which power of attorney shall clearly and specifically set forth what business and to what extent the said agent or agents are authorized to transact in behalf of said Company, unless the power of attorney as aforesaid be general, in which case the said Company shall be bound by the acts of said agent to whatever extent the said agent assumes to act, and the said power of attorney shall be recorded in all counties within this Territory where said Company hold real estate; and all of the acts of said agent in any matter relating to conveyances of real estate shall be signed by the agent, as the agent of the Saint Anthony Falls Water Power Company, and be acknowledged by him as the act of said Company, and be sealed by the common seal of the same.

SEC. 6. The capital stock of said Company shall be one hundred and sixty thousand dollars, and be divided into shares of one hundred dollars each, and in lieu of the capital stock being paid in money, the said corporators may convey to said Company, all real and personal estate and property owned jointly by them, and when so conveyed the said real and personal estate and property shall be held by said Company as the capital stock thereof, and each corporator shall own of the

whole capital stock in the same proportion and ratio as he owned of the property constituting the same, which shall be apportioned as the said corporators may agree.

SEC. 7. The stock of said Company shall not be liable to taxation against the individual stockholders or the Company, but the property constituting said capital stock shall be taxed against the corporation in the same manner as other property in this Territory.

SEC. 8. Each of the stockholders of said Company shall be personally liable for the debts of said Company, to an amount equal to the amount of the capital stock held by said stockholder, and no more, and the said Company may by a majority vote, voting by shares as aforesaid, increase the said capital stock, at any annual or special meeting of said Company, regularly called according to the by-laws of said Company.

SEC. 9. The said corporators are hereby authorized for the purpose of the improvement of the water power above and below the Falls of Saint Anthony, in the Mississippi river, to maintain the present dams and sluices, and construct and maintain dams, canals, and water sluices, erect mills, buildings, or other structures for the purpose of manufacturing in any of its branches, or improving any water power owned or possessed by said Company, in such manner or to such extent as shall be authorized by the Directors of said Company, and may construct dams on the rapids above or below the Falls of Saint Anthony, with side dams, sluices, and all other improvements in the Mississippi River, upon the property owned or to be owned by said corporators, which may be necessary for the full enjoyment of the powers herein granted; Provided, however, that said corporation shall give a free passage for all loose logs that are to be manufactured on Hennepin or Cataract Islands, or between them on the Falls through any dam or dams they may erect, on the west side of Nicollet or Hennepin Islands, and the passage through the pond, above said dam, shall when needed, be twenty feet wide; Provided, that noth-

ing herein contained shall be so construed as to authorize said corporation to interfere with the rights or property of any other person or persons whatever.

SEC. 10. All acts or parts of acts inconsistent with this act are hereby repealed.

SEC. 11. This act shall take effect and be in force from and after its passage.

CHARLES GARDNER,
Speaker of the House of Representatives.

JOHN B. BRISBIN,
President of the Council.

Approved—February twenty-sixth, one thousand eight hundred and fifty-six.

W. A. GORMAN.

I certify the foregoing to be a correct copy of the original bill on file in this office.

J. TRAVIS ROSSER,
Secretary of Minnesota Territory.

Page 215, Laws of Minnesota, 1856.

7.

CHARTER OF THE MINNEAPOLIS MILL COMPANY.

AN ACT ENTITLED AN ACT TO INCORPORATE THE MINNEAPOLIS MILL COMPANY.

Be it enacted by the Legislative Assembly of the Territory of Minnesota:

SECTION 1. That Roswell P. Russell, M. L. Olds, George E. Huy, Jacob Elliott, Robert H. Smith and Dorilus Morrison, their associates, successors and assigns, are hereby created a body corporate, with perpetual succession under the name and style of the Minneapolis Mill Company, and by that name and style shall be, and are hereby made capable in law to, have, purchase, receive, possess, sell, convey and enjoy real and personal estate, and retain to them, their successors and assigns all such lands, tenements, and hereditaments, to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended in courts of record and elsewhere, and to do any and all acts that the members thereof might or could lawfully do as individuals, and shall have and enjoy all proper remedies at law and equity, to secure and protect them in the exercise and use of the rights and privileges, and in the per-

formance of the duties herein granted and enjoined, and to prevent all invasion thereof, or interruption in exercising and performing the same, to make such by-laws as they may deem proper, and also to have, make and use a common seal, and alter, renew, or change the same at pleasure.

SEC. 2. The officers of said Company shall be a President, Treasurer, three Directors, and a Secretary, whose duties shall be prescribed by the by-laws of said Company, but the said company may increase the number of Directors at any time by a majority vote of the stock of said Company.

SEC. 3. The term of office of each of the officers of said Company shall be one year, and until their successors in office shall be elected and qualified. That Roswell P. Russell shall call the first meeting of said corporaters, by giving personal written notice to each of said corporators, designating therein the time and place of holding the same, at which time and place he shall call said meeting to order, and be President pro tempore thereof. The said meeting shall then proceed to ballot for President thereof, who, when elected shall be President of said meeting, and also first President of said Company; after which the said meeting shall proceed to elect a Secretary of said Company, who shall be Secretary of said meeting, and also the first Secretary of said Company; the said meeting shall then proceed to elect three Directors and a Treasurer of said Company, after which said Company shall be deemed to be organized for the purpose of transacting business. The first officers of said Company shall be selected by a majority vote of the corporators present, and after said first meeting, the elections of all officers of said Company, and all business requiring the votes of said Company, shall be made by a majority of the shares of the capital stock of the same, each stockholder having the right either in person or by proxy to cast as many votes as he may own shares of the capital stock therein.

SEC. 4. If an election of officers shall not be made on the day specified in the by-laws for that purpose, said corporation shall not for that cause, be dissolved but such election may be

made on any other day, in such manner as shall be prescribed by the by-laws of said corporation.

SEC. 5. When said Company is organized as aforesaid, at any annual or special meeting thereof, the said company may by vote of a majority of the stockholders, voting by shares, as aforesaid, elect for a term of one or more years, an agent or agents for the transaction of the business of said Company, who shall reside within this Territory, and have such power and authority to transact the business of said company, as the said company by vote as aforesaid, shall delegate and authorize; and no agent elected as aforesaid shall enter upon the duties of his office, or transact any business in behalf of or for said Company, until the President and Directors thereof, shall make and execute a power of attorney in due form and acknowledge the same before any officer empowered to take acknowledgments of deeds within this Territory, which Power of Attorney shall clearly and specifically set forth what business, and to what extent the said agent or agents are anthorized to transact in behalf of said Company, unless the powers of attorney as aforesaid be general, in which case the said Company shall be bound by the acts of said agent to whatever extent the said agent assumes to act, and shall be recorded in all counties within this Territory where said Company hold real estate; and all of the acts of said agent in any matter relating to conveyances of real estate shall be signed by the agent as the agent of the Minneapolis Mill Company, and be acknowledged by him as the act of said company, and be sealed by the common seal of the same.

SEC. 6. The capital stock of said Company shall be one hundred and sixty thousand dollars, and be divided into shares of one hundred dollars each, and in lieu of the capital stock being paid in money, the said corporators may convey to said Company, all the real and personal estate and property owned jointly by them, and when so conveyed, the said real and personal estate and property shall be held by said Company as the capital stock thereof, and each corporator shall own of the

whole capital stock in the same proportion and ratio as he owned of the property constituting the same, which shall be apportioned as the said corporators may agree.

SEC. 7. The stock of said Company shall not be liable to taxation against the individual stockholders of the Company, but the property constituting said capital stock shall be taxed against the corporation in the same manner as other property in this territory.

SEC. 8. Each of the stockholders of said Company shall be personally liable for the debts of said Company to an amount equal to the amount of the capital stock held by each stockholder, and no more, and the said Company may by a majority vote, voting by shares as aforesaid, increase the said capital stock, at any annual or special meeting of said Company, regularly called according to the by-laws of said Company.

SEC. 9. The said corporators are hereby authorized, for the purpose of the improvement of the water power above and below the Falls of St. Anthony in the Mississippi river to maintain the present dams and sluices, and to construct dams, canals and water sluices, erect mills, buildings, or other structures for the purpose of manufacturing in any of its branches, or improving any water power owned or possessed by said Company in such manner to such extent as shall be authorized by the Directors of said Company, and may construct dams on the rapids above or below the Falls of St. Anthony, with side dams, sluices, and all other improvements in the Mississippi river which may be necessary for the full employment of the powers therein granted.

SEC. 10. All acts and parts of acts, inconsistent with this act, are hereby repealed.

SEC. 11. This act shall take effect and be in force from and after its passage, and may be amended by any subsequent Legislative Assembly, in any manner not destroying or impairing the vested rights of said corporators: Provided, that nothing herein contained shall be so construed as to authorize said

corporation to interfere with the rights or property of any other person or persons whatever.

SEC. 12. Provided further, that nothing contained in the act entitled an act to incorporate the St. Anthony Falls Water Power Company shall be so construed as to allow the said St. Anthony Falls Water Power Company, to maintain or construct dams or sluices extending beyond the center of the channel of the Mississippi river from the western bank of Hennepin Island, and said St. Anthony Falls Water Power Company are hereby restricted in the exercise of powers and privileges granted by the ninth section of said act to the space between the western bank of said island and the center of said river; Provided, the said dam shall always be provided with suitable slides and sluices, so as to admit the passage of logs and timber down the Mississippi river, and that any future Legislature may amend or modify this act, or the act to which this section is amendatory, and provided further, that the Minneapolis Mill Company shall be restricted in its operations to the center of the main channel of the Mississippi river and to the property belonging to said Company.

CHARLES GARDNER,
Speaker of the House of Representatives.
JOHN B. BRISBIN,
President of the Council.

Approved—February twenty-seventh, one thousand eight hundred and fifty-six.

W. A. GORMAN.

I hereby certify the foregoing to be a correct copy of the original bill on file in this office.

S. TRAVIS ROSSER,
Secretary of Minnesota Territory.

Page 236, Laws of Minnesota, 1856.

8.

CHAPTER 110, LAWS 1885.

AN ACT TO AMEND AND CONSOLIDATE AN ACT TO AUTHORIZE THE CITY OF ST. PAUL TO PURCHASE THE FRANCHISES AND PROPERTY OF THE ST. PAUL WATER COMPANY AND CREATING THE BOARD OF WATER COMMISSIONERS, APPROVED FEBRUARY TEN (10), ONE THOUSAND EIGHT HUNDRED AND EIGHTY ONE (1881), AND THE ACT AMENDATORY THEREOF, APPROVED THE TWENTY-FIFTH (25TH) DAY OF JANUARY, ONE THOUSAND EIGHT HUNDRED AND EIGHTY THREE (1883).

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. The act entitled "An act to authorize the city of St. Paul to purchase the franchises and property of the St. Paul Water company," and creating the board of water commissioners, approved February ten (10), one thousand eight hundred and eighty-one (1881), and the act amendatory thereof, approved the twenty-fifth (25th) day of January, one thousand eight hundred and eighty-three (1883), are hereby amended and consolidated so that the same shall constitute one act and read as follows:

SEC. 2. Whereas, by an act of the legislature of Minnesota, entitled "An act to incorporate the St. Paul Water Company," approved May twenty-six (26), one thousand eight hundred and fifty seven (1857), and sundry acts supplementary thereto, and amendatory thereof, the said company have full power and authority given it to introduce water into the city of St. Paul from any place or places situate in the county of Ramsey, and to lay water pipes in and through the streets, avenues, lands and squares thereof, and to have full and exclusive right to lay pipes for conducting water into any of the

streets, avenues, lanes, alleys and squares of said city, and to adopt any other necessary means to furnish water to any inhabitants of said city, and by virtue of the several acts aforesaid; and, whereas, the great increase of the business and population of the city of St. Paul, and the inadequacy of the supply of water now furnished by said company to answer the wants of the said city have rendered it expedient that the duty of supplying the said city with pure and wholsome water for all purposes should be undertaken and carried forward as in this act provided, and that the property, rights and franchises of the said St. Paul Water company should be purchased from said company by said city, if the same can be accomplished by the payment of a fair and just compensation. Now, therefore, it is hereby made the duty of the judges of the district court of the second (2d) judicial district, or a majority thereof, whenever requested by the common council of the city of St. Paul, to appoint five (5) competent persons, without regard to their residence, one of whom shall be a practical civil engineer, and familiar with erection and maintenance of water works, whose duty it shall be, after taking an oath to faithfully and honestly discharge the duties of said appointment, to inquire into and report as to the efficiency of the general plan adopted by said water company to supply the city with water; what plan or system they would recommend so as to furnish an adequate supply of water to all parts of the city, and the cost thereof; the propriety of the purchase of the St. Paul Water Company's property and franchises by the city of St. Paul, and such other facts as the common council of the city may order and direct, and for which services the said persons, appointed as aforesaid, shall be entitled to such reasonable compensation as the common council may order and direct. * * *

SEC. 4. That all authority under this act shall be exercised by a board of commissioners, to be known and designated as the board of water commissioners, to be appointed as herein designated. * * *

SEC. 5. Said board of water commissioners may sue and be sued, plead and be impleaded, answer and be answered unto, appear and prosecute unto final judgment in any court or elsewhere in the name of said board of water commissioners, have a common seal and the same alter at pleasure. They may employ all proper engineers, surveyors, clerks, or other agents or assistants necessary or convenient for accomplishing the purposes contemplated by this act, and may enter upon any land or water for the purpose of making surveys and examinations for the same. They may prosecute any action in the name of said board of water commissioners against any person or persons for money due for the use of water, or the breach of any contract, express or implied, touching the execution or management of the works or distribution of the water, or of any promise or contract made to or for them; and also for any injury or trespass or nuisance done or caused or procured to be done to the water courses, pipes, machinery, or any other apparatus belonging to or connected with any part of the works, or for any improper use or waste of the water; and said board shall have full power and authority to take and convey from the sources of supply now used by the St. Paul Water Company or which they are empowered to use, and from any other source sufficient to supply the city of St. Paul with pure and wholesome water for all purposes, and for the purposes aforesaid, in all things to exercise all the necessary rights, powers and franchises of the said St. Paul Water Company to be conveyed as aforesaid to the said city of St. Paul.

SEC. 6. That the said board of water commissioners may from time to time for the purpose of furnishing a full supply of water to the inhabitants of the city of St. Paul, extend said water works or make new lines of works, and as it shall from time to time so extend its said works or make new lines of works, it may draw water from any lake or creek by means of pipes, ditches, drains, conduits, aqueducts, or other means of conducting water so as to connect said lakes or creeks with its said works and may erect and construct dams, bulk-heads,

gates, and other needed structures and means for controlling of water and its protection, and in general to do any other act necessary or convenient for accomplishing the purposes contemplated by this act.

SEC. 7. Whenever at any time said board shall propose to extend its said works so as to connect with any of said lakes or creeks, or to divert the water of any stream, creek, or body of water, it shall proceed as follows: Said board shall cause to be made a survey of the line along which it shall so propose to extend its said works and of all lands or other property to be affected by flowage, drainage or otherwise, and for that purpose it may, by its officers and agents, enter upon any lands doing no unnecessary damage thereto. After such survey shall have been made and such line located, it shall cause to be made a map showing the location of said line and the lands necessary to be taken for such extension, and of lands or other property to be affected by flowage, drainage or otherwise. Said map shall be acknowledged by the surveyor making the same and by the president of the board of water commissioners, and shall be filed as a record in the office of the register of deeds of the proper county. And after making compensation as hereinafter provided to the owners of or persons interested in the lands so to be taken, and for damages by reason of diverting the water of any stream, creek or body of water, said city shall have an easement in said land designated on said map for all the purposes contemplated in this act, which said easement shall include the right of passage without doing unreasonable damage from any public highway to and from the land included or covered by said easement. The damage for said right of passage shall be estimated in apportioning the amount of damage to be paid for such easement. * * *

SEC. 11. The owner or owners of any such land or lands may maintain a suit for the recovery of the possession of lands used by the board of water commissioners, for the value thereof, and the damage thereto by reason of the taking thereof as aforesaid, either by flowage, drainage or otherwise, or damage of any kind.

SEC. 12. The defendant, the board of water commissioners, may by answer admit and allege the taking of the plaintiff's land for the use of the board of water commissioners, for the purposes of introducing water into the city of St. Paul, and that no compensation has been paid therefor, and that the defendant is ready and willing to pay such compensation upon having the same assessed by the jury trying the action, provided the plaintiff on trial shall establish his right to recover the land in question.

SEC. 13. In all such actions where the defendant by answer admits and pleads, as hereinabove specified, the jury shall try, and by their verdict find whenever the plaintiff is entitled to recover for the land in controversy, and if so entitled, the amount of compensation to which the plaintiff is entitled for the taking and perpetual use of this land for the purposes herein specified; Provided, That when it appears that the land was so taken or appropriated, by and with the consent and acquiescence of the owner, such owner shall not be entitled to recover any rents or profits which accrued prior to the demand for compensation for such land, and he shall be limited to recovery in such case to compensation for the land taken and damages. * * *

SEC. 23. That said board shall regulate the distribution and use of the water in all places, and for all purposes where the same shall be required for either public or private use, and fix the price and rates therefor; *Provided, however*, That in the case of fire hydrants for the extinguishment of fires, and public fountains and watering places, the board shall fix and locate the same as the common council of said city may direct. On the line of constructed works, where practicable, said board shall, from time to time, cause to be assessed the water rate to be paid by the owner or occupant of any house or other building having or using water, on the basis and for the purposes in this act specified, and such water rates shall become a continuing lien until paid, upon such house or other building, and upon the lot or lots upon which such house or other building

is situated. The said city of St. Paul shall pay out of the general fund of said city and place, to the account of said board at the price and rates so fixed by said board for all water furnished and supplied to said city for public fire hydrants for the extinguishment of fires, for water used at public fountains and watering places, for water furnished and supplied to any of the boards or departments of said city, as the same are or may be hereafter established, and all other water supplied to or used or consumed by said city. The said board shall keep separate accounts with each of said boards and departments of all water furnished and consumed by each of said respective boards and departments. And said board is hereby authorized and required to restrain and prevent any and all wastage of water, and to that end may, when in its judgment necessary, turn off the water or take such other action as in its judgment may be proper.

SEC. 24. In case of damage to the pipes or works of the water board, caused by a change of grade or operation of any department of the city, such damage shall be paid out of the general fund of said city, except in cases where an assessment shall be made by the board of public works of said city for a change of grade as now or as may be hereafter provided by law. In such case the damage occurring to the board of water commissioners shall be paid out of such assessment.

SEC. 25. That the said board shall have full power and authority to require payment in advance for the use of water furnished by them in or upon any building, place or premises, and in case prompt payment for the same shall not be made they may shut off the water from such building, place or premises, and shall not be compelled again to supply said building, place or premises with water until said arrears with interest thereon, together with the cost and expense of turning said water off and on shall be fully paid.

SEC. 26. In addition to all other powers conferred upon said board, they are authorized to, and shall assess upon each and every lot in the city of St. Paul in front of which water

pipes are laid an annual tax or assessment of ten (10) cents per lineal foot of the frontage of such lot or lots, and which shall be a lien upon such lot or lots and shall be collected as hereinafter provided.

SEC. 27. That the said board shall make up, on or before the first (1st) day of August in each and every year, a detailed statement, duly certified to by the president and secretary of said board of commissioners under the seal of said board for the tax or assessment described in the foregoing section for the year preceding and ending on the first (1st) day of December, which statement shall be transmitted by the secretary of said board to the county auditor of Ramsey county as delinquent taxes for collection; whereupon it shall be the duty of the county auditor to extend the same on his rolls against the property in said statement as aforesaid, for collection, and if not paid within the time prescribed by law then the same shall become a lien on said real estate, and said real estate shall be subject to all the penalties and charges as property delinquent for taxes for county and state purposes. All moneys collected or paid into the treasury of Ramsey county on account of said assessment or tax shall be paid over, from time to time, to the city of St. Paul for the use of said board of water commissioners. * * *

SEC. 34. Any and all causes of action, either at law or in equity, which may now exist, or which may hereafter occur by reason of any act or omission by or on the part of the board of water commissioners, or of any of its servants, agents, employees, or otherwise, shall be brought and maintained by such claimant or claimants against the said board of water commissioners, anything in the statutes of the state of Minnesota to the contrary notwithstanding. And any and all judgments recovered against said board of water commissioners shall be paid out of any moneys in the hands of the city treasurer of the city of St. Paul belonging to said board, as other indebtednesses are paid. * * *

SEC 36. The term "real estate," as used in this act, shall be construed to signify and embrace all uplands, lands under water, the waters of any lake, pond or stream, all and every estate, interest, and right, legal and equitable, in lands or water, including term for years, and liens thereon by way of judgment, mortgage or otherwise, and also all claims for damage to such real estate. * * *

SEC. 37. This act shall take effect and be in force from and after its passage.

Approved March 4, 1885.

Page 287, Laws of Minnesota, 1885.

9.

SYLLABUS AND OPINION OF SUPREME COURT OF MINNESOTA IN CASES AT BAR.

SYLLABUS.

1. The rights of riparian owners on navigable or public streams of water are subordinate to public uses of such water, and the rights of these appellants under their charters are equally subordinate to such public uses.

2. The public have the right to apply the waters of a navigable stream to public uses without making compensation to riparian owners.

3. The navigation of the stream is not the only public use to which these public waters may be applied. The right to draw from them a supply of water for the ordinary use of cities in their vicinity is such a public use, and this right is not affected by the fact that consumers are charged for water used as a means of paying the cost of maintaining the plant.

4. In thus taking water from navigable streams or lakes for ordinary public uses the State is not controlled by the rules which obtain between riparian owners as to the diversion from and return of water to its natural channels.

5. Certain provisions in respondent's charter relating to compensation for damages arising out of the taking and diversion of water construed: Held, that those provisions were not intended to provide for compensation to riparian owners on navigable or public streams.

OPINION.

These cases were tried together in the court below, and when plaintiffs, appellants here, rested both actions were dismissed upon defendant's motion. From orders refusing new trials appeals were taken. Plaintiffs are corporations created in 1856 by acts of the territorial legislature and authorized to build and maintain dams in the Mississippi river, at the falls of St. Anthony, about ten miles above St. Paul, for the development of water power and for the use and sale of such power. One of these corporations, owning the shore on the east side of the river, erected a dam to the proper point in the river channel, and the other, owning the west shore, built its dam so as connect the two, thus forming a power which has ever since been maintained and used.

In 1883 the legislature authorized the city of St. Paul to purchase, and there was purchased, the property and franchises of a private corporation theretofore engaged in supplying said city with water. A board of water commissioners was created by the same act, and that board, a branch of the city government is the present respondent. By the provisions of an amendatory act, G. L. 1885, ch. 110, sec. 5, et seq., the board was authorized and empowered to add to its sources of supply and to draw water from any lake or creek, and in general to do any act necessary in order to furnish an adequate supply of water for the use of the city. The manner in which it should

acquire the right to extend its works so as to connect with any body of water deemed necessary for an increased supply was specified, and in section 7 it was provided that "after making compensation as hereinafter provided to the owners of or the persons interested in the lands so as to be taken and for damages by reason of diverting the water of any stream, creek or body of water, said city shall have an easement therein." In section 8 provisions was made for the appointment of commissioners to assess the damages sustained by the owners of lands to be taken, or by other persons by reason of such taking or arising by the construction, use and operation of the works. Under this act the defendant duly established a pumping station at Lake Baldwin, a body of water with an area less than a mile square, and by means of its pumps forced water through conduits to the city for public use. The outlet of this lake is Rice creek, and this creek empties into the Mississippi river a few miles above the dams built and maintained by appellants. Claiming that the result of this diversion of water was to greatly diminish the volume which came to the dam and to materially affect and reduce the water power, plaintiffs brought these actions to restrain and enjoin perpetually the operation of defendant's works at the lake and the diversion of water therefrom.

Counsel for both parties made lengthy oral arguments and have filed very full briefs. Many questions have been discussed which we do not regard as connected with the case, and hence we need not refer to them. There are a few well settled principles which we regard as covering and controlling the facts before us, and a statement of these, with a construction of certain parts of the act under which defendant's board was authorized to obtain further and other sources of water supply, will dispose of these appeals.

1. The plaintiffs are riparian owners on a navigable or public stream, and their rights as such owners are subordinate to public uses of the water in the stream. And their rights

under their charters are, equally with their rights as riparian owners, subordinate to these public uses.

2. There can be no doubt but that the public, through their representatives, have the right to apply these waters to such public uses without providing for or making compensation to riparian owners.

3. The navigation of the stream is not the only public use to which these public waters may be thus applied. The right to draw from them a supply of water for the ordinary use of cities in their vicinity is such a public use and has always been so recognized. At the present time it is one of the most important public rights, and is daily growing in importance as population increases. The fact that the cities, through boards of commissioners or officers whose functions are to manage this branch of the municipal government, charge consumers for water used by them as a means for paying the cost and expenses of maintaining and operating the plant, or that such consumers use the water for their domestic and such other purposes as water is ordinarily furnished by city water works, does not affect the real character of the use or deprive it of its public nature.

4. In thus taking water from navigable streams or lakes for such ordinary public uses the power of the State is not limited or controlled by the rules which obtain between riparian owners as to the diversion from and its return to its natural channels. Once conceding that the taking is for a public use and the above proposition naturally follows.

5. Turning now to the provisions of defendant's charter, Laws 1885, ch. 110, it will be seen that the board was not limited to public waters as the sources of its contemplated additional supplies. It was authorized to appropriate private waters for the purpose, and hence the provisions of the act which provided for the ascertaining of and making compensation for damages caused by a diversion of water must be construed as applying solely to cases where the board took private property by using or diverting merely private waters. Inas-

much as the State itself could use the waters in question as against the plaintiffs without compensation, it would require very clear language to that effect to justify the conclusion that the legislature intended to impose on respondent board the burden of paying plaintiffs for what as against the public they did not own. If the right granted by the legislature had been excluslvely to divert waters from a certain specified body of public water, such as one of the "great" ponds of Massachusetts, referred to in the cases cited from the reports of that State, so that the provisions in Laws 1885, ch. 110, relating to compensation, could not apply to anything else,—to the owners of private waters, for instance,—the construction contended for by appellants that it was intended they should be compensated in case damages resulted might arise by implication.

Orders affirmed. COLLINS, J.

The chief justice did not sit. Vanderburgh, J., took no part in the decision.

Vol. 56 Minnesota Reports p. 485.

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APPENDIX.